4-5-2012

Washington Federal Savings v. Engelen Augmentation Record Dckt. 38484

In the Supreme Court of the State of Idaho

WASHINGTON FEDERAL SAVINGS, a United States Corporation,	)	
	)	ORDER
Plaintiff-Respondent,	)	
	)	Supreme Court Docket No. 38484-2011
v.	)	Ada County District Court No. 2009-17209
H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN,	)	Ref. No. 12-111
Defendants-Appellants.	)	

A REQUEST FOR JUDICIAL NOTICE with attachments, a MOTION TO AUGMENT THE RECORD with attachments, an APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT and a BRIEF IN SUPPORT OF APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT with attachments, were filed by counsel for Respondent on March 7, 2012. Thereafter, a RESPONSE TO MOTION TO AUGMENT THE RECORD, REQUEST FOR JUDICIAL NOTICE, AND APPLICATION TO VACATE STAY, with attachments, was filed by counsel for Appellants on March 23, 2012. Subsequently, WASHINGTON FEDERAL'S REPLY TO VAN ENGELEN'S RESPONSE TO MOTION TO AUGMENT THE RECORD, REQUEST FOR JUDICIAL NOTICE, AND APPLICATION TO VACATE STAY was filed by counsel for Respondent on April 2, 2012. This Court is fully advised, therefore, good cause appearing,

IT HEREBY IS ORDERED that the REQUEST FOR JUDICIAL NOTICE be, and hereby is, GRANTED and this Court shall take judicial notice of the documents listed below, copies of which accompanied the Request for Judicial Notice and placed with the EXHIBITS for the convenience of the Court:

1. Order Granting Motion to Stay Execution as to Plaintiff's Rights in this Action Against Defendants, Ada County case no. CV OC 0809440, file-stamped June 10, 2010 and Minute Entry dated June 9, 2010;
2. Order Granting Application to Vacate Stay, Supreme Court docket no. 37960, dated September 22, 2010;
3. Order Denying Application for Stay, Supreme Court docket no. 37960, dated January 31, 2011;

4. Certificate of Sale on Personal Property Sold Under Second Writ of Execution, Ada County case no. CVOC0809440, dated February 10, 2011;
5. Sheriff's Return on Second Writ of Execution, Ada County case no. CVOC0809440, file-stamped February 16, 2011;
6. Order Granting Motion to Dismiss, Supreme Court docket no. 37960, dated March 8, 2011;
7. Remittitur, Supreme Court docket no. 37960, dated April 6, 2011 and file-stamped April 13, 2011 by the district court, and
8. Memorandum Decision on Post-Judgment Motions, Madison County case no. CV-10-680, file-stamped August 31, 2011.

IT FURTHER IS ORDERED that Respondent's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Writ of Execution, dated May 12, 2011;
2. Notice of Sheriff's Sale, dated June 20, 2011;
3. Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, file-stamped July 6, 2011;
4. Affidavit of H. Craig Van Engelen in Support of Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, file-stamped July 6, 2011;
5. Order Staying Execution on Van Engelens' Appeal Rights, file-stamped September 14, 2011; and
6. Affidavit of Counsel in Support of Plaintiff's Opposition to Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, file-stamped July 15, 2011.

IT FURTHER IS ORDERED that Appellant's REQUEST TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Plaintiff's Motion Contesting Defendants' Claim of Exemption, file-stamped June 28, 2011;
2. Memorandum in Support of Plaintiff's Motion Contesting Defendants' Claim of Exemption, file-stamped June 28, 2011;
3. Opposition to Plaintiff's Motion Contesting Claim of Exemption, file-stamped July 1, 2011;
4. Affidavit of Counsel in Opposition to Plaintiff's Motion Contesting Claim of Exemption, with attachments, file-stamped July 1, 2011;
5. Memorandum in Support of Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, file-stamped July 6, 2011;
6. Memorandum in Opposition to Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, filed July 15, 2011;
7. Reply in Support of Defendant's Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, file-stamped July 22, 2011; and

8. Supplemental Authority in Support of the Van Engelens' Motion to Wai Bond and/or Enforcement of the Judgment, file-stamped September 2, 201

IT FURTHER IS ORDERED that Respondent's APPLICATION TO VA IMPOSED BY THE DISTRICT COURT be, and hereby is, DENIED.

DATED this 5 day of April, 2012.

For the Supreme Court

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Judge Cheri Copsey

In the Supreme Court of the State of Idaho

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff-Respondent, v. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants-Appellants.	)	ORDER Supreme Court Docket No. 38484-2011 Ada County District Court No. 2009-17209 Ref. No. 12-111

A REQUEST FOR JUDICIAL NOTICE with attachments, a MOTION TO AUGMENT THE RECORD with attachments, an APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT and a BRIEF IN SUPPORT OF APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT with attachments, were filed by counsel for Respondent on March 7, 2012. Thereafter, a RESPONSE TO MOTION TO AUGMENT THE RECORD, REQUEST FOR JUDICIAL NOTICE, AND APPLICATION TO VACATE STAY, with attachments, was filed by counsel for Appellants on March 23, 2012. Subsequently, WASHINGTON FEDERAL'S REPLY TO VAN ENGELEN'S RESPONSE TO MOTION TO AUGMENT THE RECORD, REQUEST FOR JUDICIAL NOTICE, AND APPLICATION TO VACATE STAY was filed by counsel for Respondent on April 2, 2012. This Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that the REQUEST FOR JUDICIAL NOTICE be, and hereby is, GRANTED and this Court shall take judicial notice of the documents listed below, copies of which accompanied the Request for Judicial Notice and placed with the EXHIBITS for the convenience of the Court:

1. Order Granting Motion to Stay Execution as to Plaintiff's Rights in this Action Against Defendants, Ada County case no. CV OC 0809440, file-stamped June 10, 2010 and Minute Entry dated June 9, 2010;
2. Order Granting Application to Vacate Stay, Supreme Court docket no. 37060, dated September 22, 2010;
3. Order Denying Application for Stay, Supreme Court docket no. 37060, dated January 31, 2011;

4. Certificate of Sale on Personal Property Sold Under Second Writ of Execution, Ada County case no. CVOC0809440, dated February 10, 2011;
5. Sheriff's Return on Second Writ of Execution, Ada County case no. CVOC0809440, file-stamped February 16, 2011;
6. Order Granting Motion to Dismiss, Supreme Court docket no. 37060, dated March 8, 2011;
7. Remittitur, Supreme Court docket no. 37060, dated April 6, 2011 and file-stamped April 15, 2011 by the district court; and
8. Memorandum Decision on Post-Judgment Motions, Madison County case no. CV-10-680, file-stamped August 31, 2011.

IT FURTHER IS ORDERED that Respondent's MOTION TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Writ of Execution, dated May 12, 2011;
2. Notice of Sheriff's Sale, dated June 20, 2011;
3. Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, file-stamped July 6, 2011;
4. Affidavit of H. Craig Van Engelen in Support of Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, file-stamped July 6, 2011;
5. Order Staying Execution on Van Engelens' Appeal Rights, file-stamped September 14, 2011; and
6. Affidavit of Counsel in Support of Plaintiff's Opposition to Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, file-stamped July 15, 2011.

IT FURTHER IS ORDERED that Appellant's REQUEST TO AUGMENT THE RECORD be, and hereby is, GRANTED and the augmentation record shall include the documents listed below, file stamped copies of which accompanied this Motion:

1. Plaintiff's Motion Contesting Defendants' Claim of Exemption, file-stamped June 28, 2011;
2. Memorandum in Support of Plaintiff's Motion Contesting Defendants' Claim of Exemption, file-stamped June 28, 2011;
3. Opposition to Plaintiff's Motion Contesting Claim of Exemption, file-stamped July 1, 2011;
4. Affidavit of Counsel in Opposition to Plaintiff's Motion Contesting Claim of Exemption, with attachments, file-stamped July 1, 2011;
5. Memorandum in Support of Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, file-stamped July 6, 2011;
6. Memorandum in Opposition to Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, filed July 15, 2011;
7. Reply in Support of Defendant's Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, file-stamped July 22, 2011; and

8. Supplemental Authority in Support of the Van Engelens' Motion to Waive Supersedeas Bond and/or Enforcement of the Judgment, file-stamped September 2, 2011.

IT FURTHER IS ORDERED that Respondent's APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT be, and hereby is, DENIED.

DATED this 5th day of April, 2012.

For the Supreme Court

for Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Judge Cheri Copsey

David E. Wishney, I.S.B #1993
Chad E. Bernards, I.S.B. #7441
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701
Telephone: (208) 336-5955
Facsimile: (208) 336-5956

ORIGINAL

Attorneys for Washington Federal Savings

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States corporation, Plaintiffs, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	CASE NO. CV OC 09-17209 WRIT OF EXECUTION

TO: THE SHERIFF OF ADA COUNTY, STATE OF IDAHO, GREETINGS:

WHEREAS, on the 14th day of December, 2010, the Plaintiff above named recovered a money Judgment and on the 27th day of January, 2011, recovered an Amended Judgment, in the above entitled Court against the Defendants H. Craig Van Engelen and Kristen Van Engelen, above named for the:

TOTAL SUM OF:	$ 5,036,998.86
Amount paid by Defendant or by Execution:	$ 0.00
BALANCE:	$ 5,036,998.86
Plus Accruing Interest :	$ 111,303.40
Plus Accruing Costs:	$ 2.00

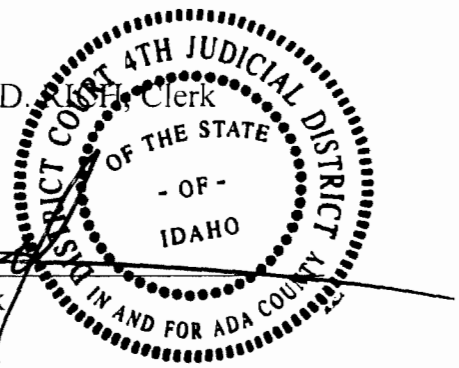
AMOUNT DUE AND OWING: $ 5,148,304.26

NOW, YOU, THE SAID SHERIFF are hereby requested to satisfy said Judgment, with interest at the legal rate, plus accruing costs, and Sheriff's fees out of the personal property of said Defendants or if sufficient personal property of said Defendants cannot be found, then out of the real property belonging to the said Defendants, and make return of this Writ within sixty (60) days after receipt hereof with what you have done endorsed thereon.

WITNESS, my hand and the seal of the said Court, this 12 day of May, 2011.

CHRISTOPHER D. RICH, Clerk

BY: Deputy Clerk



David E. Wishney, I.S.B. #1993
Chad E. Bernards, I.S.B. #7441
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701
Telephone: (208) 336-5955
Facsimile: (208) 336-5956

Attorneys for Washington Federal Savings

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States corporation, Plaintiffs, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	CASE NO. CV OC 09-17209 NOTICE OF SHERIFF'S SALE

*****

Under and by virtue of a money judgment rendered out of the above-captioned Court, which Judgment was entered on the 14th day of December, 2010, and the Writ of Execution being issue on the 12TH day of May, 2011, in the above-captioned action, wherein the above-named Plaintiff Washington Federal Savings obtained a money judgment against the above-named Defendants H. Craig Van Engelen and Kristen Van Engelen, jointly and

severally, for the sum of $4,996,101.65, together with an award of attorney's fees and cost for the sum of $40,897.21, together with post judgment interest in the amount of $111,303.40 being calculated at the statutory rate of 5.375% from December 14, 2010 through May 10, 2011, for a total sum of **$5,148,302.26**, together with accruing interests and costs, all of which are to be satisfied out of the proceeds of the claims, causes of action, choses in action, defenses and/or affirmative defenses, rights to appeal, and all rights, title, and interest held by Defendants H. Craig Van Engelen and Kristen Van Engelen in the litigation of Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Case No. CV 09-17209 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by H. Craig Van Engelen and Kristen Van Engelen in the matter known as Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Idaho Supreme Court Docket No. 38484-2011.

NOTICE IS HEREBY GIVEN, that on Thursday, the 7TH day of July, 2011, at 9:30 o'clock a.m./~~p.m.~~ of said day at the steps of the Public Safety Building located at 7200 Barrister Drive, Boise, Idaho 83704, I will in obedience to said Order, and Writ Of Execution, levy upon the claims, causes of action, choses in action, defenses and/or affirmative defenses, rights to appeal, and all rights, title, and interest held by Defendants H. Craig Van Engelen and Kristen Van Engelen in the

litigation of Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Case No. CV 09-17209 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by H. Craig Van Engelen and Kristen Van Engelen in the matter known as Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Idaho Supreme Court Docket No. 38484-2011, to satisfy the above-referenced money judgment, together with all interest thereon and costs of sale.

DATED THIS 20TH day of ~~May~~ June, 2011.

GARY RANEY, Sheriff
Ada County, State of Idaho

By: Diane Thurlow
Deputy Sheriff

Thomas A. Banducci (ISB No. 2453)
tbanducci@bwslawgroup.com
Wade L. Woodard (ISB No. 6312)
wwoodard@bwslawgroup.com
Dara Parker (ISB No. 7177)
dparker@bwslawgroup.com
Banducci Woodard Schwartzman PLLC
802 W. Bannock St., Suite 500
Boise, ID 83702
Telephone: (208) 342-4411
Facsimile: (208) 342-4455

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	Case No. CV-OC 0917209 **MOTION TO WAIVE REQUIREMENT OF SUPERSEDEAS BOND AND STAY EXECUTION AND/OR ENFORCEMENT OF THE JUDGMENT**

Defendants H. Craig Van Engelen and Kristen Van Engelen move the Court to waive the requirement of a supersedeas bond and stay execution and/or enforcement of the judgment pending appeal. This motion is made pursuant to Idaho Code § 13-202 and Idaho Appellate Rule 13(b), and is supported by the affidavit of Kristen Van Engelen and a Memorandum in Support, filed contemporaneously herewith. In addition, as requested in a contemporaneously filed Motion to Shorten time, it is requested that this Court shorten time so that this motion may be

ORIGINAL

heard at the hearing presently scheduled on related issue for July 7, 2011, at the hour of 3:00 p.m.

DATED this 6th day of July 2011.

BANDUCCI WOODARD SCHWARTZMAN PLLC

Dara L. Parker
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of July, 2011, a true and correct copy of the within and foregoing instrument was served upon:

David E. Wishney
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701

☐ U.S. Mail
☒ Facsimile (208) 336-5956
☐ Hand Delivery
☐ Overnight Delivery

Dara L. Parker

NO. _____
A.M. _____ FILED P.M. 3:52

JUL 06 2011

CHRISTOPHER D. RICH, Clerk
By JERI HEATON
DEPUTY

Thomas A. Banducci (ISB No. 2453)
tbanducci@bwslawgroup.com
Wade L. Woodard (ISB No. 6312)
wwoodard@bwslawgroup.com
Dara Parker (ISB No. 7177)
dparker@bwslawgroup.com
Banducci Woodard Schwartzman PLLC
802 W. Bannock St., Suite 500
Boise, ID 83702
Telephone: (208) 342-4411
Facsimile: (208) 342-4455

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	Case No. CV-OC 0917209 AFFIDAVIT OF H. CRAIG VAN ENGELEN IN SUPPORT OF MOTION TO WAIVE REQUIREMENT OF SUPERSEDEAS BOND AND STAY EXECUTION AND/OR ENFORCEMENT OF THE JUDGMENT

County of ___)
): ss
State of Texas)

I, H. Craig Van Engelen, first being duly sworn, subscribe and state as follows:

1. I make this affidavit upon my personal knowledge.

2. I am a Defendant in the above-title action.

3. My wife Kristen Van Engelen and I are requesting a waiver from the Court of the requirement to post a supersedeas bond and an order staying execution of the judgment during the pendency of the appeal.

4. The judgment in this case was $5,036,998.86. My understanding of Idaho law is that a supersedeas bond which would have stayed execution requires posting of a supersedeas bond in the amount of the judgment plus 36% of such amount, for a total bond of $6,850,318.26

5. My wife and I were employed as land developers for decades. The economic downturn destroyed our business.

6. In addition to the $6 million debt owed to Washington Federal Savings which is at issue in this lawsuit, we owed approximately $2 million to Mountain West Bank, $1 million to Home Federal Bank, and at least $13 million to Bank of the Cascades. We were engaged in litigation in litigation with Mountain West Bank and Home Federal Bank, but acknowledge that we had valid personal guarantees with those banks and were able to settle by transferring many of our remaining business assets. The $13 million debt to Bank of the Cascades is still outstanding.

7. In addition to these liabilities, we have liabilities for other debts in an amount exceeding $1 million.

8. Our liabilities far exceed our very limited remaining assets.

9. Our income has been devastated by the economic downturn. We have had no positive income (and in fact, substantial negative income) for the past five years.

10. Given our financial condition, we knew we would be unable to qualify for a supersedeas bond in the amount of $6,850,318.26.

11. Given our financial condition, we were also unable to post a cash deposit to cover the $5,036,998.86 judgment.

DATED this 6 day of July, 2011.

H. Craig Van Engelen

SUBSCRIBED AND SWORN before me this 6th day of July 2011

KEELY K. ODELL
Notary Public, State of Texas
My Commission Expires
MAY 17, 2013

Keely K. Odell
Notary Public

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of July, 2011, a true and correct copy of the within and foregoing instrument was served upon:

David E. Wishney
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701

☐ U.S. Mail
☒ Facsimile (208) 336-5956
☐ Hand Delivery
☐ Overnight Delivery

Dara L. Parker

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS,
Plaintiff,

vs.

H. CRAIG VAN ENGELEN AND KRISTIN L. VAN ENGELEN,

Defendants.

Case No. CV-OC-2009-17209

ORDER STAYING EXECUTION ON VAN ENGELENS' APPEAL RIGHTS

On November 12, 2010, the Court granted Washington Federal Savings' Motion for Summary Judgment against H. Craig and Kristen Van Engelen (collectively "Van Engelens"), finding that as guarantors, the Van Engelens were contractually obligated to Washington Federal ("the Bank"). On December 14, 2010, the Court entered a money judgment against the Van Engelens in the amount of $4,996,101.65. The Bank moved for costs and attorney fees. The Court granted attorneys fees and costs. The Court entered an Amended Judgment in the amount of $5,036,998.86 on January 27, 2011, including costs and fees. On January 25, 2011, the Van Engelens filed a Notice of Appeal.

Prior to filing the Notice of Appeal, on December 16, 2010, the Van Engelens requested the Bank waive the supersedeas bond requirement and the Bank refused.

On May 12, 2011, the Court issued a Writ of Execution. The Bank then instructed the Ada County Sheriff to levy upon and sell all claims, causes of action, choses in action, defenses, affirmative defenses, rights to appeal, and all rights, title, and interest held by the Van Engelens. The Sheriff set the execution sale for July 7, 2011. On June 21, 2011, the Van Engelens filed a Claim of Exemption and Supplemental Claim of Exemption claiming that their appeal rights were exempt from levy. They also alleged that they were financially unable to post a supersedeas bond in the amount required under the appellate rule, I.A.R. 13(b)(15).

On June 28, 2011, the Bank contested the Van Engelens' claim of exemption. On July 6, 2011, the Van Engelens moved the Court to waive any requirement for a supersedeas bond and stay execution. The Court heard argument on July 7, 2011.

After hearing argument, the Court ordered additional briefing. More specifically, the Court ordered the parties to address any due process or other constitutional claims that might be implicated by the Bank's execution on the Van Engelens' appeal rights and subsequent dismissal of their appeal.

The parties filed additional briefing, and the Court heard argument on September 1, 2011, and took the matter under advisement.

For the reasons stated below, the Court finds that in Idaho, because parties have a statutory right to appeal pursuant to I.C. § 13-101, the constitutional requirements of due process and equal protection apply to the exercise of that right. *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951). Therefore, the Court finds that allowing a judgment creditor (the Bank) to purchase the judgment debtor's (the Van Engelens) right to appeal the very judgment giving rise to the debt, effectively permits the judgment creditor to deny the debtor his statutory right to appeal without due process. Based on the Court's ruling, the Court stays the Bank's right to execute on the Van Engelens' right to appeal only. The Court does not stay the Bank's right to execute against any other of the Van Engelens' rights or property absent the Van Engelens posting a proper supersedeas bond pursuant to I.A.R. 13(b)(15).

ANALYSIS

This is a matter of first impression in Idaho.[1] In a nutshell, the Bank contends that the Van Engelens' appellate rights are simply another chose in action that can be purchased at an execution sale by the judgment creditor (the Bank) in that same action. Once the Bank purchases the Van Engelens' appeal right, the Bank intends to dismiss their appeal. While initially arguing that someone other than the Bank would be interested in purchasing the Van Engelens' right to appeal this Court's decision at an execution sale, during oral argument the Bank conceded those appeal rights have no value to anyone other than the Bank or the Van Engelens. Clearly, no one

[1] While the Idaho Supreme Court denied a Motion for Stay in another case, the order was simply entered by the Clerk of the Supreme Court without opinion.

would be interested in purchasing the right to appeal a substantial judgment, thus becoming potentially liable for that same judgment. On appeal the most any such purchaser could obtain *even if successful* was *relief* from paying the $5,000,000 judgment. Therefore, these appeal rights have no value to anyone other than the Van Engelens and the Bank and the Court finds that the only reason the Bank would purchase the appeal rights was to extinguish the Van Engelens' right to appeal that judgment.

Due to the economic times, this practice has been increasingly used to abrogate a party's right to appeal specific court decisions. Once the appeal rights are purchased for a minimal amount, any appeal is then dismissed by the new owner of the appeal right – in these cases, the successful party to the same litigation. Especially in cases like this one where a guarantee is at the heart of the cause of action and a substantial judgment has been entered, the judgment debtor (the losing party) may not have the funds for a cash deposit or the ability to obtain a supersedeas bond meeting the appellate rule requirements to stay execution on his appeal rights. *See* I.A.R. 13 (b)(15)(requiring the bond be in the amount of the judgment plus 36%). Therefore, since the current appellate rule grants no discretion to modify the requirement for a bond or cash deposit *even for good cause*, a judgment debtor in this situation effectively loses his right to appeal the very decision creating the judgment without any meaningful process.

However, where, as here, the court does not stay execution against a judgment debtor's other property without posting a proper bond or cash deposit, a judgment creditor's rights are nonetheless protected while still recognizing a party's right to appeal. The Bank can still execute against any other property owned by the Van Engelens.

A. The right to appeal is a statutory right.

As a matter of due process, no one has a constitutional right to an appeal. *McKane v. Durston*, 153 U.S. 684, 687 (1894). Neither Federal nor Idaho Constitutions provides a blanket right to an appeal. *Abney v. U.S.* 431 U.S. 651, 656 (1997), *State v. Moran-Soto*, 150 Idaho 175, 244 P.3d 1261 (Ct. App. 2010). At the time of the adoption of the Idaho constitution, however, a complete system of appeals was a part of the law. The Idaho Constitution specifically requires the legislature to provide a system of appeal. Art. 5 § 13, provides in relevant part as follows:

> The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the

> government; but the legislature *shall* provide a *proper system of appeal*, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution.

(Emphasis added.) Thus, the right to appeal, time for taking appeals, and requirements for appeal have always been an area reserved by the constitution to the legislature for change or modification. *See Weiser Irr. Dist. v. Middle Valley, etc., Co.*, 28 Idaho 548, 552, 155 P. 484, ___ (1916).

The right to appeal, procedures involved, time for appeals, and all other associated processes are presently governed by Idaho Code Title 13, Chs. 1 and 2.[2] As the Idaho Supreme Court observed in *Dolbeer v. Harten*, 91 Idaho 141, 148, 417 P.2d 407, 414 (1965) "[i]t is of interest to note that Title 13, Ch. 1 and all of Ch. 2, (except I.C. § 13-222), were first enacted in 1881." In other words, the right to appeal has been long established in Idaho.[3]

Once an appellate procedure is provided by a state, such procedure must meet the constitutional requirements of due process and equal protection. *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 208 (1951).

B. Requiring an appellant to post a bond or cash deposit in order to exercise his right to appeal as set forth in I.A.R. 13(b)(15) violates due process.

On their face, the Idaho appellate rules do not grant any discretion to either the District Court or the Supreme Court to stay execution or enforcement of a money judgment on appeal absent the filing of a supersedeas bond or a cash deposit. I.A.R. 13(b)(15) and (16) provide, in relevant part, as follows:

> **b) Stay Upon Appeal--Powers of District Court--Civil Actions.** In civil actions, unless prohibited by order of the Supreme Court, the district court shall have the power and authority to rule upon the following motions and to take the following actions during the pendency on an appeal; . . .
>
> (15) Stay execution or enforcement of a money judgment *upon the posting of a cash deposit or supersedeas bond by a fidelity, surety, guaranty, title or trust*

---

[2] I.C. § 13-201 provides as follows: "An appeal may be taken to the Supreme Court from a district court in any civil action by such parties from such orders and judgments, and within such times and in such manner as prescribed by Rule of the Supreme Court."

[3] As discussed below, not all states recognize a right to appeal which affects the way such jurisdictions address this situation.

> *company authorized to do business in the state and to be a surety on undertakings and bonds, either of which must be in the amount of the judgment or order, plus 36% of such amount. . . .*
>
> (16) Any order of the Supreme Court as to whether or not a judgment, order, decree or proceeding shall be stayed shall take precedence over any order entered by the district court.

(Emphasis added.) Given that appeal rights are property[4] and are subject to execution,[5] the Court is without authority under the Rule to stay execution of that property unless the appellant posts the requisite bond or cash deposit.

However, the statute authorizing the Supreme Court to adopt rules addressing stays on appeal, I.C. § 13-202, provides, in relevant part, as follows:

> (1) Upon and after an appeal of a judgment or order of the district court in a civil action, the judgment or order appealed from, or any other order or proceeding in the action *may* be stayed by the district court or the supreme court as provided by rule of the supreme court.
>
> (2) If a plaintiff in a civil action obtains a judgment for punitive damages, the supersedeas bond or cash deposit requirements *shall* be waived as to that portion of the punitive damages that exceeds one million dollars ($1,000,000) if the party or parties found liable seek a stay of enforcement of the judgment during the appeal.
>
> ***
>
> (4) *The supersedeas bond or cash deposit requirements may* ***also*** *be waived in any action for* ***good cause*** *shown as provided by rule of the supreme court.*

I.C. § 13-202 (emphasis added). The legislature clearly intended that the court have the discretion to waive the requirement that an appellant post bond or cash deposit for good cause.

The Idaho Appellate Rules, however, do not allow any discretion even though the enacting legislation, subsection (4), clearly anticipates they would. In fact, the Idaho Appellate Rules do

---

[4] Idaho law recognizes that a "thing in action" or "chose in action" is included within the definition of "personal property". *See e.g.* I.C. § 73-114(2)(c) (personal property includes "things in action"). Idaho Law recognizes that "things in action" are transferable. *See* I.C. § 55-402 (Transfer and Devolution of Things in Action).

[5] Idaho Code § 11-201 governs a writ of execution on a judgment:

> PROPERTY LIABLE TO SEIZURE – All goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and property and rights of property, seized and held under attachment in the action, are liable to execution.

(Emphasis added); *see also* I.C. § 11-301 (Execution of Writ).

not incorporate subsection (2) specifically requiring that any supersedeas bond or cash deposit be waived for punitive damages in excess of $1,000,000.

As the Supreme Court recently observed, ordinarily, the right to appeal, as well as many of the procedures applicable to that right, are governed by the Idaho Appellate Rules. *See Camp v. East Fork Ditch Co., Ltd.,* 137 Idaho 850, 860, 55 P.3d 304, 314 (2002). That is because Idaho Code § 13-201 provides, "An appeal may be taken to the Supreme Court from a district court in any civil action by such parties from such orders and judgments, and within such times and in such manner as prescribed by Rule of the Supreme Court."

As the Supreme Court also observed, "in enacting that statute, *however*, the legislature *did not and could not* divest itself of its constitutional power . . ." related to the right to appeal. *See Deeds v. Regence Blueshield of Idaho*, 143 Idaho 210, 214-216, 141 P.3d 1079, 1083-1085 (2006) (emphasis added). Throughout the years, the Supreme Court has frequently recognized the legislature's authority to determine what may be appealed or under what circumstances. *Oneida v. Oneida,* 95 Idaho 105, 108, 503 P.2d 305, 308 (1972); *Wilson v. DeBoard,* 94 Idaho 562, 563, 494 P.2d 566, 567 (1972); *State ex rel. State Board of Medicine v. Smith,* 80 Idaho 267, 269, 328 P.2d 581, 581-82 (1958), 80 Idaho at 328 P.2d at; *Evans State Bank v. Skeen,* 30 Idaho 703, 704-05, 167 P. 1165, 1165-66 (1917).

Any attempted abrogation of the right to appeal[6] must meet the constitutional requirements of due process and equal protection. *Dowd, supra.* The right to procedural due process guaranteed under both the Idaho and United States Constitutions requires that a person involved in the judicial process be given meaningful notice and a ***meaningful*** opportunity to be heard. *See Fuentes v. Shevin,* 407 U.S. 67 (1972); *Boddie v. Connecticut,* 401 U.S. 371 (1971); *Rudd v. Rudd*, 105 Idaho 112, 115, 666 P.2d 639, 642 (1983) (citing *Mays v. District Court,* 34 Idaho 200, 200 P. 115 (1921)). While conceding this principle applies, the Bank contends the meaningful opportunity to be heard is met at the Sheriff's sale. This Court disagrees.

By granting discretion to the courts, the legislature's solution meets due process requirements. The legislature correctly recognized occasions where compelling a cash deposit or

---

[6] The Court notes that this particular statutory appeal right is limited to civil litigation. Another statute addresses the right to appeal criminal convictions. I.C. § 19-2801.

supersedeas bond to prevent execution on certain property may be inequitable. However, the Idaho Appellate Rules do not contain such discretion making any hearing a waste of time.[7]

Allowing a judgment creditor in the same action to end an appeal of that very judgment using this method violates due process because there is no meaningful opportunity to be heard. While the judgment debtor can have a hearing, such hearing is meaningless because the court has no discretion to grant any relief -- even though such discretion was clearly provided for by the legislature. Thus, the Court finds that allowing the Bank to execute on the Van Engelens' appeal rights in this case and thereby deny them their right to appeal violates due process.[8]

The Court agrees with the Tenth Circuit's clear uneasiness with this method of end running an appeal. The Tenth Circuit expressed real concerns over this practice in a case where a judgment creditor executed upon a final judgment in the same case that produced the judgment upon which it executed thus precluding any review of the merits. *RMA Ventures California v. Sun America Life Ins. Co.*, 576 F.3d 1070, 1072-75 (10th Cir. 2009). On appeal, the only issue before the Tenth Circuit was whether the original judgment debtor had standing to continue to prosecute its appeal; the Tenth Circuit properly ruled it did not have standing.

Although expressing its reservations, the Tenth Circuit refused to address the real issue head on because, according to the Tenth Circuit, the debtor "failed to preserve the issue for appeal" by not appealing the federal court's denial of its motion to stay execution on its appeal rights. Of course, this presupposes that the debtor, RMA, could have preserved it. However, it is

---

[7] To the extent that the Van Engelens direct the Court's attention to I.R.C.P. 62(a) and I.A.R. 13(b)(8), such reliance is misplaced. I.R.C.P. 62(a) does not apply to stays upon appeal, I.R.C.P. 62(d) applies to stays upon appeal. Likewise, I.A.R. 13(b)(8) only applies to stays of injunctions or mandatory orders. I.A.R. 13(b)(15) applies to staying execution or enforcement of monetary judgments.

[8] While the Bank discusses Utah cases, the Court notes that Utah does not have a statutory or constitutional right to appeal like Idaho's statute. Furthermore, a careful reading of those cases indicates that these were not choses in action in the same case. *See Applied Medical Techs., Inc. v. Eames,* 44 P.3d 699, 701 (Utah 2002)(allowing a judgment creditor to execute upon a final judgment in one case to purchase a chose in action in a separate and distinct case). Likewise, Utah also decided that it was bad public policy to allow a law firm to purchase the appeal rights of its own malpractice case. *Snow, Nuffer, Engstrom & Drake v. Tanasse,* 980 P.2d 208 (Utah 1999). In addition several states have expressly prohibited the purchase of a pending cause of action at an execution sale. *See* Cal.Civ.Proc.Code § 699.720(a)(3); *Prodigy Ctrs./Atlanta v. T–C Assocs.*, 501 S.E.2d 209, 211 n. 3 (Ga. 1998) ("Choses in action are not liable to be seized and sold under execution, unless made so specifically by statute."). *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306 (Tex.Ct.App. 1992) (holding that judgment creditor was barred from executing on judgment debtors claims against judgment creditor even though Texas statute provided generally for execution against causes of action).

questionable because its appeal rights would have been purchased by the judgment creditor, SunAmerica. This fact highlights the problem with this entire procedure. In a strong concurring opinion, one Judge, Circuit Judge Lucero, summarized the Circuit Judges' concerns as follows:

> It is with considerable understatement that the majority acknowledges the "degree of discomfort" presented by this case. While I am constrained to agree that we must dismiss, I am troubled by the manner in which SunAmerica has extinguished RMA's right to a merits appeal.
>
> This case presents a classic chicken-and-egg dilemma: By executing on a subsidiary judgment, SunAmerica has extinguished RMA's right to appeal the very merits determination that served as the predicate for the subsidiary judgment in the first place. If we were to reach the merits and reverse the district court's decision, however, there is little doubt that RMA would be entitled to relief from the subsidiary attorneys' fee judgment. . . . . RMA will not have the opportunity to pursue its merits appeal and thus no opportunity to file a 60(b)(5) motion.
>
> As a matter of public policy, I doubt the wisdom of a rule that readily places the right to appeal on an auction block. More troublesome still is a rule permitting a defendant to purchase its opponent's appellate rights, thereby extinguishing a plaintiff's claim. "[A defendant] obviously has no intention to litigate a claim against itself." *Snow, Nuffer, Engstrom & Drake v. Tanasse,* 980 P.2d 208, 211 (Utah 1999). Today's decision thus incentivizes Utah defendants to attempt an end run around merits determinations by purchasing a plaintiff's right to appeal. This incentive is at its zenith when it is most offensive—in those cases in which a defendant believes it would likely lose the merits appeal.
>
> As the Utah Supreme Court has noted, the actual value of a claim purchased by an opponent at auction will never be fairly determined. *Id.* at 211–12. SunAmerica, of course, hoped to purchase RMA's claim at the lowest possible cost. Being the highest and only bidder, SunAmerica paid $10,000 to extinguish a claim against itself that RMA valued at over $950,000. (Perhaps not coincidentally, the defendant in *Tanasse* also paid $10,000 to purchase the claim against itself. *Id.* at 209). Because of our dismissal, we will not know whether SunAmerica paid fair value.
>
> Despite these problems, it appears that Utah law generally authorizes judgment creditors to purchase a chose in action through execution on another judgment. *See Applied Med. Techs. v. Eames,* 44 P.3d 699, 701–02 (Utah 2002); *Tanasse,* 980 P.2d at 211. In the absence of a special relationship between the plaintiff and defendant, e.g., attorney/client, a chose in action is an alienable form of property under Utah law. *Tanasse,* 980 P.2d at 211. But in the typical situation—to the extent any such transaction may be termed "typical"—a judgment creditor executes upon a final judgment in one case to purchase a chose in action in a separate and distinct case. By contrast, SunAmerica purchased the right to appeal in the same case that produced the judgment upon which it executed. Thus this

> appeal's circularity: We cannot reach the merits of this appeal if we grant the motion to dismiss, but we cannot know whether the motion to dismiss is well-taken unless we reach the merits.

Id. at 1076-77.

The Court agrees with the Tenth Circuit's observations. It does present a "classic chicken-and-egg dilemma." If the Court permits the Bank to execute on the Van Engelens' appeal rights in this instance, the Bank will have extinguished the Van Engelens' right to appeal the very merits determination that served as the predicate for the judgment in the first place. It would thus deprive the Van Engelens of their statutory right to appeal without due process of law. They will be unable to pursue the merits of their appeal.

Therefore, the Court stays execution of the Van Engelens' appeal rights finding there is good cause to enter such stay. However, the Court will not stay any execution against any other property owned by the Van Engelens absent their compliance with I.A.R. 13(b)(15). This preserves the purpose for requiring a supersedeas bond or cash deposit – to ensure that property is available to satisfy a judgment if the appeal is not successful – while protecting the right to appeal.

IT IS SO ORDERED.

Dated this 13th day of September 2011.

Cheri C. Copsey
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of September 2011, I mailed (served) a true and correct copy of the within instrument to:

DAVID E. WISHNEY
CHAD E. BERNARDS
P.O. BOX 837
BOISE, IDAHO 83701

THOMAS BANDUCCI
DARA PARKER
WADE WOODARD
BANDUCCI, WOODARD SCHWARZMAN
802 W. BANNOCK STREET, SUITE 500
BOISE, IDAHO 83702

CHRISTOPHER D. RICH
Clerk of the District Court

Deputy Clerk

David E. Wishney, I.S.B. #1993
Chad E. Bernards, I.S.B. #7441
Attorneys and Counselors at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701
Telephone: (208) 336-5955
Fax: (208) 336-5956

Attorneys for Plaintiff Washington Federal Savings

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN L. VAN ENGELEN, Defendants.	CASE NO. CV OC 0917209 **AFFIDAVIT OF COUNSEL IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO WAIVE REQUIREMENT OF SUPERSEDEAS BOND AND STAY EXECUTION AND/OR ENFORCEMENT OF THE JUDGMENT**

STATE OF IDAHO)
) ss.
County of Ada)

Chad E. Bernards, being first duly sworn, upon oath deposes and says:

1. That, your affiant is one of the attorneys of record for the Plaintiff, Washington Federal, and makes this affidavit upon his personal knowledge.

2. That, this affidavit is made in support of Plaintiff's Opposition to Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment.

3. That, attached hereto as Exhibit 1 is a true and correct copy of the June 10, 2010, District Court's Order granting Motion to Stay Execution ast to Plaintiff's Rights in This Action Against Defendants, together with the Minute Entry.

4. That, attached hereto as Exhibit 2 is a true and correct copy of the September 22, 2010 Order Granting Application to Vacate Stay.

5. That, attached hereto as Exhibit 3 is a true and correct copy of the January 31, 2011 Order Denying Application for Stay.

6. That, attached hereto as Exhibit 4 is a true and correct copy of the Certificate of Sale on Personal Property Sold Under Second Writ of Execution.

7. That, attached hereto as Exhibit 5 is a true and correct copy of the Sheriff's Return on Second Writ of Execution.

8. That, attached hereto as Exhibit 6 is a true and correct copy of the March 8, 2011 Order Granting Motion to Dismiss.

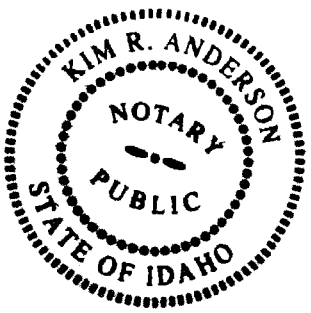
9. That, attached hereto as Exhibit 7 is a true and correct copy of the April 15, 2011 Remittitur.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DATED this 15th day of July, 2011.

Chad E. Bernards

SUBSCRIBED AND SWORN TO before me this 15th day of July, 2011.



NOTARY PUBLIC for Idaho
Residing at Kuna, Id
My commission expires: 9-18-15

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document entitled **AFFIDAVIT OF COUNSEL IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO WAIVE REQUIREMENT OF SUPERSEDEAS BOND AND STAY EXECUTION AND/OR ENFORCEMENT OF THE JUDGMENT** was served this 15 day of July, 2011, on the following by:

Thomas Banducci
Wade Woodard
Dara Labrum
BANDUCCI WOODARD SCHWARTZMAN PLLC
802 W. Bannock Street, Suite 500
Boise, Idaho 83702

___ U.S. Mail
___ Hand Delivered
___ Overnight Mail
X Facsimile No. (208) 342-4455

Chad E. Bernards

David E. Wishney, I.S.B. #1993
Chad E. Bernards, I.S.B. #7441
Attorneys and Counselors at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701
Telephone: (208) 336-5955
Fax: (208) 336-5956

Attorneys for Plaintiff Washington Federal Savings

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN L. VAN ENGELEN, Defendants.	CASE NO. CV OC 0917209 **PLAINTIFF'S MOTION CONTESTING DEFENDANTS' CLAIM OF EXEMPTION**

COMES NOW, the Plaintiff, WASHINGTON FEDERAL SAVINGS ("Washington Federal"), by and through its counsel of record, and pursuant to I.C. § 11-203(b) states the following grounds upon which it contests the claim of exemption made by the Van Engelen Defendants on June 21, 2011, particularly, the Supplemental Claim of Exemption made on that same date, as to the following property:

> Causes of action, chooses [sic] in action, defenses and/or affirmative defenses, rights to appeal, and all rights, title, and interest held by them in the litigation of Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Case No. CV OC 09-17209 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title and interest held by the Van Engelen defendants in the matter known as Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Idaho Supreme Court Docket No. 38484-2011.

See, Supplemental Claim of Exemption at pg. 2.

The grounds for this objection are as follows:

1. Idaho law recognizes the above-described "lawsuit," and the appeal rights arising out of that lawsuit, as valuable property rights.

2. In the absence of a statutory exemption, the Plaintiff is entitled to seizure and execute upon the above-described property in satisfaction of its judgment.

3. There is no statutory exemption for the above-described property, and consequently it is subject to seizure under the writ of execution.

In compliance with Fourth District Local Rule 8.1, this Motion is further supported by the accompanying brief. A separate notice of hearing also accompanies this Motion.

Respectfully submitted this 28 day of June, 2011.

Chad E. Bernards
Attorney for the Plaintiff
Washington Federal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document entitled **PLAINTIFF'S MOTION CONTESTING DEFENDANTS' CLAIM OF EXEMPTION** was served this 28 day of June, 2011, on the following by:

Thomas Banducci
Wade Woodard
Dara Labrum
BANDUCCI WOODARD SCHWARTZMAN PLLC
802 W. Bannock Street, Suite 500
Boise, Idaho 83702

Attorneys for the Defendants

___ U.S. Mail
___ Hand Delivered
___ Overnight Mail
_X_ Facsimile No. (208) 342-4455

Chad E. Bernards

David E. Wishney, I.S.B. #1993
Chad E. Bernards, I.S.B. #7441
Attorneys and Counselors at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701
Telephone: (208) 336-5955
Fax: (208) 336-5956

Attorneys for Plaintiff Washington Federal Savings

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN L. VAN ENGELEN, Defendants.	CASE NO. CV OC 0917209 **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION CONTESTING DEFENDANTS' CLAIM OF EXEMPTION**

I.
QUESTION PRESENTED

The Van Engelen Defendants have asserted that an exemption exists protecting from seizure under a writ of execution their continuing rights as defendants in this action, and also in their rights as appellants in the appeal that they have taken to the Idaho Supreme Court resulting from the judgment that was entered against them in this action. Such an exemption, if recognized under Idaho

law, would prevent Washington Federal from seizing the Van Engelens' rights in those "things in action" pursuant to its writ of execution under the judgment, and then, after seizing those rights, dismissing the Van Engelens' appeal. The nature of the Defendants' claimed exemption, for which Washington Federal contests, is stated by the Defendants as follows:

> Causes of action, chooses [sic] in action, defenses and/or affirmative defenses, rights to appeal, and all rights, title, and interest held by them in the litigation of Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Case No. CV OC 09-17209 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title and interest held by the Van Engelen defendants in the matter known as Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Idaho Supreme Court Docket No. 38484-2011.

See, Supplemental Claim of Exemption at pg. 2.

As is further argued below, the burden is upon the Van Engelens to establish a statutory basis for their claimed exemption. The Van Engelens failed to state any statutory basis for their claimed exemption filed with this Court. Although the law in Idaho is not particularly well-developed on this question, claims that are made in lawsuits have been statutorily declared to be "property" under Idaho law within the general category of "things in action." Consequently, in the absence of an applicable statutory exemption, there is no reason why Washington Federal should be precluded from seizing the Van Engelens' appellate rights under its writ of execution, and then dismissing that appeal.

II.
STANDARD OF REVIEW

The determination of whether property is exempt from execution presents a question of law for the court to determine through application of the express terms of a statutory exemption. If the

statute is unambiguous, then it must be applied as written, unless the result would be palpably absurd. *Grease Spot, Inc. v Harnes*, 148 Idaho 582, 584, 226 P.3d 524, 526 (2010). If the statute is ambiguous, then the interpretation of the statute presents a question of law to be determined by application of the rules of statutory interpretation by the court. *Id.* A statute is not ambiguous merely because an astute mind can devise more than one interpretation of it. *Canty v. Idaho State Tax Commission*, 138 Idaho 178, 182, 59 P.3d 983, 985 (2002).

III.
ARGUMENT

The general rule, as stated in I.C. § 11-201, is that all property that is "**not exempt**" is liable to attachment in satisfaction of a writ of execution on a judgment:

> **§ 11-201. PROPERTY LIABLE TO SEIZURE – All goods, chattels, moneys and other property, both real and personal,** or any interest therein of the judgment debtor, **not exempt by law**, and all property and rights of property, seized and held under attachment in the action, **are liable to execution**. Shares and interest in any corporation or company, and debts and credits, and all other property both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

(Emphasis added).

Idaho law recognizes that a "thing in action," or a "chose in action" constitutes a valuable property right. Except for certain provisions in Idaho's Uniform Probate Code, I.C. §§ 15-5-431, 15-4-201, and 15-3-1201, and the Idaho Insurance Code, I.C. § 41-1233, Idaho law generally uses the phrase "thing in action," rather than "chose in action," to describe these property rights. Black's Law Dictionary lists "thing in action" as an alternative to the use of the phrase, "chose in action."

See, BLACK'S LAW DICTIONARY, at pg. 275 (9th ed., 2009 - West). In *Karle v. Visser*, 141 Idaho 804, 807-08, 118 P.3d 136, 139-140 (2005) the Idaho Supreme Court recognized a "lawsuit" as being within the category of property constituting a "chose in action" or "thing in action" for purposes of the definition of a "general intangible" under the Uniform Commercial Code.

The following Idaho statutory definitions set out the basis in Idaho law for recognizing the Van Engelens' property interest in their lawsuit and appeal, for which they have claimed an exemption from the Bank's writ of execution (although they have cited no statutory basis for that claimed exemption):

> **73-114. STATUTORY TERMS DEFINED –**
>
> . . .
>
> (2) The following words have, in the compiled laws, the signification attached to them in this section, unless otherwise apparent from the context:
>
> . . .
>
> (c) "Personal property" includes money, goods, chattels, **things in action**, evidences of debt **and general intangibles as defined in the uniform commercial code - secured transactions**.

(Emphasis added).

> **28-9-102. Definitions and index of definitions.** – (a) In this chapter:
>
> . . .
>
> (42) "General intangible" means any personal property, **including things in action**, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter of credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

(Emphasis added).

Under Idaho law a "thing in action" is transferrable property, as declared in I.C. § 55-402, the text of which is set out immediately below:

> **55-402. TRANSFER AND DEVOLUTION OF THINGS IN ACTION** – A thing in action arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office.

Of particular relevance to this matter, a "thing in action" is specifically declared to be subject to a writ of execution under I.C. § 11-301, which declares as follows:

> **11-301. EXECUTION OF WRIT** – The sheriff must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property if there be sufficient; collecting or **selling the things in action**, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff, he must levy only on such part of the property as the judgment debtor may indicate, if the property indicated be amply sufficient to satisfy the judgment and costs.
>
> The provisions of sections 8-507 through 8-507D, Idaho Code, shall apply to a levy upon personal property.

(Emphasis added).

Under Idaho law the burden of proof, which is required to establish that any particular property "is exempt by law" from execution, is placed upon that person or party that is claiming that exemption, which in this case is the Van Engelens. 35 C.J.S. Exemptions, § 199 *Presumptions and Burden of Proof—Nature, Character, and Value of Property*. Cited in support of this general rule is the Idaho Court of Appeals decision in *Hooper v. State*, 127 Idaho 945, 908 P.2d 1252 (Ct.App. 1995) in which that Court held as follows:

> It is well recognized that a debtor's right to exempt property from the claims of creditors **is not a common law right but is dependent upon constitutional or statutory allowance**. 31 AM.JUR.2d, Exemptions, § 2 (1989). Thus, the general rule is that assets are not exempt from the claims of creditors unless specifically exempted by statute. *Id.* Furthermore, **a debtor claiming an exemption generally must prove that his claim comes within the exemption provisions**. *Id.*, § 367.

127 Idaho at 950, 908 P.2d at 1257 (emphasis added).

Most of Idaho's exemption statutes are found in chapter 6, title 11 of the Idaho Code. No statute within that chapter provides any basis in support of an exemption that would apply to the Van Engelens' rights in the lawsuit, or its appeal. The Van Engelens have offered no citation to any statutory or constitutional basis that would support their claim of exemption.

Nor does the Van Engelens' claimed exemption fall within the scope of the general purpose that is to be served by Idaho's exemption statutes, which was set out in *Lemp v. Lemp*, 32 Idaho 397, 184 P. 222 (1919) in reliance upon the following statement of the holding of the California Supreme Court in *Holmes v. Marshall,* 145 Cal. 777, 79 P. 534 (1905):

> "In construing this statute, as in the construction of all statutes, it is the duty of the court to arrive at the intent of the Legislature, if it can be done, from the language used in the statute. Statutes exempting property from execution are enacted on the ground of public policy, for the benevolent purpose of saving debtors and their families from want by reason of misfortune or improvidence. The general rule now is to construe such statutes liberally, so as to carry out the intention of the Legislature

McMillan v. U.S. Fire Insurance Co., 48 Idaho 163, 168, 280 P. 220, 222 (1929) ("Conceding that exemption statutes are to be liberally construed (*Coughanour v. Hoffman's Estate*, 2 Idaho 290, 13 P. 231; *Elliot v. Hall*, 3 Idaho 421, 35 Am.St. 285, 31 P. 796, 18 L.R.A. 586), it must likewise be borne in mind that exemptions are but creatures of statute, and that while the statutes will be liberally construed, such construction should be reasonable. (See 25 C. J., p. 11.)"). The Idaho Bankruptcy Court made the following observation in a 2010 decision, *In Re Grimmett*, 2010 WL 1257363, at * 3 (Bkrtcy.D.Ida., March 24, 2010) ("[W]hile Idaho's exemption statutes are liberally construed in Debtor's favor, the statutory language may not be "tortured" in the guise of liberal construction.").

In the absence of any applicable exemption, the Van Engelens have no basis to sustain their objection to the seizure of their rights in the lawsuit and appeal as stated in their claim of exemption.

Even though the Van Engelens have not stated any basis in support of their claimed exemption, Washington Federal anticipates that they will argue that, even though a "chose in action," or a "thing in action" can be seized in satisfaction of a writ of execution, an appeal right is not fairly encompassed within that category of property rights.

Although no Idaho appellate case appears to have addressed this issue, several other jurisdictions have addressed this question and held in various different contexts that a chose or thing in action necessarily encompasses the right to appeal that is associated with the underlying cause of action or claim. *See e.g.*, *RMA Ventures California v. Sun America Life Ins. Co.*, 576 F.3d 1070, 1072, 1075 (10th Cir. 2009) ("The property noticed for public sale, however, was Plaintiff's right to the chose in action (*i.e*, the legal claims) against Defendants in the instant case, including Plaintiff's right to appeal the district court's grant of summary judgment." . . . "[W]e are unable to

ignore the fact that a public execution sale took place in which Defendants purchased Plaintiff's legal right to continue this appeal for $10,000."); *Department of Transportation v. Foster*, 586 S.E.2d 64, 65 (Ga.App.2003) ("The right to appeal the condemnor's estimate of just and adequate compensate is a chose in action."); and *Ridgeway v. Jones*, 84 So. 692, 693 (Miss.1920) ("[T]he assignee of any interest in a chose in action may begin, prosecute, and continue any suit or action thereon in the name of the assignor, in which right is necessarily embraced that of an appeal to this court.").

In *Smith v. Corlett* and *Rosera,* (Ada County District Court Case No. CV OC 2008-09440; Supreme Court Docket No. 37060-2009), the Plaintiff, *Smith*, appealed an adverse judgment and award of attorneys fees awarded. When the Plaintiff failed to post an appeal bond, the Defendant caused the Ada County Sheriff to execute upon the Plaintiff's appeal rights. Upon application by the Plaintiff, the trial court entered an Order staying the execution sale. The Defendant then appealed the trial court's stay order. Following briefing, in an unpublished Order, without discussion, the Supreme Court vacated the trial court's stay order. The Defendant purchased the Plaintiff's appeal rights at the execution sale and thereafter dismissed the appeal. Attached is a copy of the Supreme Court's Order vacating the trial court's stay order.

IV.
CONCLUSION

Pursuant to the reasons outlined above, Washington Federal respectfully requests that its Motion Contesting Defendants' Claim of Exemption with respect to Defendants' appeal rights be granted.

Respectfully submitted this 28 day of June, 2011.

Chad E. Bernards
Attorney for the Plaintiff
Washington Federal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document entitled **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION CONTESTING DEFENDANTS' CLAIM OF EXEMPTION** was served this 28 day of June, 2011, on the following by:

Thomas Banducci
Wade Woodard
Dara Labrum
BANDUCCI WOODARD SCHWARTZMAN PLLC
802 W. Bannock Street, Suite 500
Boise, Idaho 83702

Attorneys for the Defendants

___ U.S. Mail
___ Hand Delivered
___ Overnight Mail
X Facsimile No. (208) 342-4455

Chad E. Bernards

In the Supreme Court of the State of Idaho

JAMES M. SMITH, a single person

Plaintiff-Appellant,

v.

JOE CORLETT,

Defendant- Third Party Plaintiff-Respondent,

and

CATHY ROSERA,

Defendant-Respondent,

v.

ANTHONY C. D'ANGELO and JUDY D'ANGELO, husband and wife, and WHISTLER POINT, LLC, an Idaho limited liability company,

Third Party Defendants.

ORDER GRANTING APPLICATION TO VACATE STAY

Supreme Court Docket No. 37060-2009
Ada County Docket No. 2008-9440

Ref. No. 10-294

1. An APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT and a MEMORANDUM IN SUPPORT OF APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT were filed by counsel for Respondents on June 16, 2010.

2. An APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN THIS ACTION AGAINST DEFENDANTS and a MEMORANDUM RESPONDING TO APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT AND SUPPORTING APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECTUION AS TO PLAINTIFF'S RIGHTS IN THIS ACTION AGAINST DEFENDANTS were filed by counsel for Appellant on June 30, 2010.

Entered on JSI
By:

3. An OBJECTION TO THE APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN THIS ACTION AGAINST DEFENDANTS and a REPLY MEMORANDUM IN SUPPORT OF APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT were filed by counsel for Respondents on July 12, 2010.

4. A REPLY TO DEFENDANTS' OBJECTION TO THE APPLICATION OF JAMES SMITH FOR ORDER STAYING EXECUTION AS TO PLAINTIFF'S RIGHTS IN THIS ACTION AGAINST DEFENDANTS was filed by counsel for Appellant on July 28, 2010.

The Court is fully advised; therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondents' APPLICATION TO VACATE STAY IMPOSED BY THE DISTRICT COURT be, and hereby is, GRANTED.

DATED this 22nd day of September 2010.

By Order of the Supreme Court

Stephen W. Kenyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Deborah A. Bail

Thomas A. Banducci (ISB No. 2453)
tbanducci@bwslawgroup.com
Wade L. Woodard (ISB No. 6312)
wwoodard@bwslawgroup.com
Dara Parker (ISB No. 7177)
dparker@bwslawgroup.com
BANDUCCI WOODARD SCHWARTZMAN PLLC
802 W. Bannock St., Suite 500
Boise, ID 83702
Telephone: (208) 342-4411
Facsimile: (208) 342-4455

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	Case No. CV-OC 0917209 **OPPOSITION TO PLAINTIFF'S MOTION CONTESTING CLAIM OF EXEMPTION**

Defendants H. Craig Van Engelen and Kristen Van Engelen ("the Van Engelens") submit this Opposition to the Motion of Plaintiff Washington Federal Savings ("Washington Federal" or "the Bank") contesting their claim of exemption.

BACKGROUND

In the underlying action, the parties are in a dispute about the effect of a continuing personal guarantee. This Court previously entered summary judgment in favor of the Bank, which decision the Van Engelens appealed on January 25, 2011. That appeal is ongoing; the Van Engelens recently submitted their Appellant's Brief to the Idaho Supreme Court and are awaiting the filing of the Bank's Respondent's Brief. As the Van Engelens were unable to post a supersedeas bond[1] on the judgment, which exceeded $5 million, on May 12, 2011, the Court issued a Writ of Execution. Of course, if the Van Engelens' appeal is successful, the Judgment and Washington Federal's right to collect thereon will be vacated.

However, on June 16, 2011, Defendants H. Craig Van Engelen and Kristen Van Engelen were served with a Notice and Notice of Levy that, pursuant to the Writ of Execution issued on May 12, 2011, Washington Federal was levying and attaching the Van Engelen's right to appeal this case -- the very case in which the Writ of Execution was issued. (Affidavit of Counsel in Opposition to Plaintiff's Motion Contesting Claim of Exemption ("Aff. of Counsel"), ¶ 3, Ex. A.) A sheriff's sale of their right to appeal was scheduled. (*Id.* at ¶ 4, Ex. B.) The Van Engelens therefore filed a claim of exemption contesting Washington Federal's right to foreclose on its right to appeal the case which provides the basis for the Judgment and Writ of Execution. (*Id.* at ¶ 5, Ex. C.) *See* Idaho Code §§ 8-507A and 11-203. As Washington Federal admits in its Memorandum in Support of Plaintiff Motion Contesting Defendants Claim of Exemption, it is Washington Federal's intention to execute on the Van Engelens right to appeal and thereafter dismiss the appeal. (Memorandum in Support of Plaintiff's Motion Contesting Defendants'

---

[1] Under Idaho Appellate Rule 13(b)(15), execution upon a judgment may be stayed during the pendency of an appeal upon the posting of a supersedeas bond in the amount of the judgment plus 36% of such amount.

Claim of Exemption, p. 2.) That is, Washington Federal intends to purchase its opponents' right to appeal in the very case that produced the judgment upon which it is executing.

If such a procedure is allowed, this will create a procedure in Idaho whereby the only party who has a right to appeal a potentially erroneous decision is a party who has enough money to post a supersedeas bond or other acceptable security. I.A.R. 13(b)(14) and (15). In all other circumstances, the right to appeal will be effectively foreclosed. The party holding the judgment in the case could always execute on its opponent's right to appeal, purchase that right for some sum,[2] and then, rather than addressing the merits of the appeal which seeks to undo the very judgment upon which it has executed, simply dismiss its opponent's appeal. This is a highly convenient solution for the Respondent to a civil appeal, but not one which can be permitted under Idaho law.

ARGUMENT

The Van Engelens do not contest that the right to appeal may be a valuable "thing in action" which under ordinary circumstances may be executed upon by a judgment creditor in satisfaction of another judgment. *See* Idaho Code § 11-301. However, to permit the right to appeal to be executed upon in the very action where the validity of the judgment is at issue on appeal is against public policy, would create an absurdity, and render other Idaho statutes a nullity. As such, this Court should hold that the right to appeal the judgment upon which a writ of execution is based is exempt from execution.

There is little case law discussing an attempt by a judgment creditor to execute upon the judgment debtor's right to appeal that very judgment. It appears that the only case on point[3] is

---

[2] Possibly even a de minimus sum.

[3] In its brief, Washington Federal cites a number of cases for the unremarkable position that the right appeal is a chose in action. These cases have little value in the issue of this cases,

the Tenth Circuit case *RMA Ventures California v. SunAmerica Life Ins. Co.*, 576 F.3d 1070 (10th Cir. 2009). A concurring opinion in that case aptly explains the conundrum before the Court:

> This case presents a classic chicken-and-egg dilemma: By executing on a subsidiary judgment, SunAmerica has extinguished RMA's right to appeal the very merits determination that served as the predicate for the subsidiary judgment in the first place.
>
> As a matter of public policy, I doubt the wisdom of a rule that readily places the right to appeal on an auction block. More troublesome still is a rule permitting a defendant to purchase its opponent's appellate rights, thereby extinguishing a plaintiff's claim. "[A defendant] obviously has no intention to litigate a claim against itself." *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 211 (Utah 1999). Today's decision thus incentivizes Utah defendants to attempt an end run around merits determinations by purchasing a plaintiff's right to appeal. This incentive is at its zenith when it is most offensive-in those cases in which a defendant believes it would likely lose the merits appeal. . . .
>
> . . . it appears that Utah law generally authorizes judgment creditors to purchase a chose in action through execution on another judgment. . . . But in the typical situation-to the extent any such transaction may be termed "typical"-a judgment creditor executes upon a final judgment in one case to purchase a chose in action in a separate and distinct case. By contrast, SunAmerica purchased the right to appeal in the same case that produced the judgment upon which it executed. Thus this appeal's circularity: We cannot reach the merits of this appeal if we grant the motion to dismiss, but we cannot know whether the motion to dismiss is well-taken unless we reach the merits.

Id. at 1076 (Lucro, Circuit Judge, concurring). Despite their misgivings, that concurring judge and the Tenth Circuit nevertheless approved the purchase of the appeal rights in that case because RMA had waived its arguments by failing to appeal the district court's denial of the

---

however, as none of them address whether a party may obtain his opponents right to appeal. For example, the question in *Department of Transp. v. Foster*, 262 Ga.App. 524, 586 S.E.2d 64 (Ga.App. 2003) was simply whether the administratix of an estate has starting to appeal after the death of a property owner. *Ridgeway v. Jones*, 122 Miss. 624, 84 So. 692 (Miss. 1920) merely noted that an assignee of an interest may prosecute an appeal in the name of the assignor.

motion to stay or quash execution. No such circumstance exists here, where the Van Engelens are actively seeking to protect their right to appeal.

A. Public Policy Prevents a Party from Purchasing its Opponent's Rights

A number of courts have held that public policy prevents a party from purchasing its opponent's rights with respect to other lawsuits between the parties. While these cases are not directly on point – for the present case is concerned with the more troubling situation involving the purchase of the right to appeal the very judgment being enforced – they nevertheless articulate policy concerns that are also implicated here. For example, in the case *Snow, Nuffer, Engstrom & Drake v. Tanasse,* 980 P.2d 208, 211 (Utah 1999), a former client sued his attorney for malpractice, and the attorney sued in a different case for his fees. The attorney received a default judgment for his fees. After obtaining the judgment, the attorney sought to satisfy that judgment by executing against the former client's interest in the legal malpractice action. The attorney purchased the malpractice action at a sheriff's sale for $10,000. On appeal, the Utah Supreme Court reversed this. It held that although the malpractice cause of action was something that could generally be purchased by a judgment creditor, for reasons of public policy the very law firm again which the malpractice claim had been brought could not purchase the cause of action. *Id.*, 980 at 211. The Supreme Court said:

> The acquisition of this legal malpractice claim by [attorney] creates two problems. First it has the effect of denying [former client] the right to a trial on his claims. *See* Utah Const. art. I, § 11. [Attorney] obviously has no intention to litigate a claim against itself:
>
> > When a judgment debtor's cause of action against his judgment creditor is turned over to the judgment creditor, the judgment creditor becomes the holder of a cause of action against himself. The judgment creditor becomes both plaintiff and defendant. Under such circumstances, any justifiable controversy is extinguished. Thus, the judgment debtor is forever deprived of his day in court on that cause of action.

> *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306 (Tex.Ct.App.1992). . . . Second, the appropriate value of the legal malpractice claim will never be fairly determined. . . . [Attorney], whose incentives are in favor of under-valuation, purchased the claim and assigned it the value of $10,000. . . . [Attorney's] assigned value of $10,000 was completely arbitrary.

Snow, Nuffer, Engstrom & Drake, 980 P.2d at 211. *But see Applied Medical Technologies, Inc. v. Eames*, 44 P.3d 699, 701 (2002) (declining to extend *Snow Nuffer* to preclude non-attorney civil defendants from purchasing causes of action against themselves)[4].

The same situation exists here. First, it has the effect of denying the Van Engelens of their statutory right to appeal. Idaho Code § 13-201 provides that "[a]n appeal may be taken to the Supreme Court from a district court in any civil action by such parties from such orders and judgments, and within such times and in such manner as prescribed by Rule of the Supreme Court." Idaho Appellate Rule 4 expands on this, stating that "[a]ny party aggrieved by an appealable judgment, order or decree, as defined in these rules, of a district court . . . may appeal such decision to the Supreme Court as provided in these rules." If Washington Federal is permitted to execute upon the Van Engelens' right to appeal, it will have the effect of denying the Van Engelen their statutory right to appeal.

Second, such a procedure undermines the very purpose of the execution statutes because it creates a perverse incentive for Washington Federal to undervalue the right to appeal. Washington Federal is obviously not going to pursue an action against itself, but has admitted

---

[4] *Applied Medical Technologies*, and indeed, any case in which an opposing party is permitted to purchase its opponent's separate cause of action against itself, is readily distinguishable from the present case. While the cases concerning the purchase of other causes of action are instructive because they implicate some of the same policy concerns, the circumstance in the present case goes far beyond this question. In the present case, the question is whether a party can execute upon a judgment in order to purchase the right to appeal that very judgment. As explained in more detail in the section below, the policy against allowing such a circular procedure is even stronger than in cases concerned merely with the purchase of other unrelated causes of action between the parties.

that it intends to obtain the Van Engelen's right to appeal so that it can dismiss that appeal.[5] Moreover, the appropriate value of this right to appeal cannot be fairly determined. It would be the Van Engelens contention that the value of their right to appeal the judgment is the amount of the judgment itself, but presumably Washington Federal does not intend to bid that amount. Indeed, as the amount of the sale will be offset against the judgment, Washington Federal has incentives in favor of under-valuation. This is utterly counter to the purpose of the Idaho execution statutes, which are designed to allow a judgment creditor to seize property so that its judgment can be satisfied. *Williams v. Paxton*, 98 Idaho 155, 157, 559 P.2d 1123, 1125 (1976) (party was entitled to a writ of execution to satisfy his judgment). As such, as in *Snow Nuffer*, this Court should hold that execution upon the Van Engelen's right to appeal violates public policy.

Similarly, in the case *Criswell v. Ginsberg & Foreman*, 843 S.W.2d 304, 306 (Tex.Ct.App.1992), a Court held that a party could not acquire a cause of action against itself to satisfy a judgment. In that case, Criswell sued Ginsberg. That cause of action was pending with no final judgment entered. Previously, Ginsberg had received a judgment against Criswell in another case. Ginsberg therefore requested an order from the court that Criswell "turn over" its cause of action against Ginsberg to satisfy that earlier judgment. This was based on a Texas statute that allows a judgment creditor to bring a motion for court assistance in reaching property of the judgment debtor that cannot readily be attached or levied. Texas Code § 31.002. The Texas court held it was unreasonable to use this turnover statute for Ginsberg to extinguish a cause of action against himself. *Id.*, 843 S.W.3d at 306-307. *See, also, Charles v. Tamez*, 878

---

[5] No other party has an interest in purchasing this right to appeal, as the only value of the appeal is the possibility for the Van Engelens to be given a chance to continue to defend a lawsuit against them.

S.W.2d 201, 206 (Tex.App. 1994) ("allowing creditors to use the turnover statute to purchase potential causes of action against them in order to extinguish those claims would be unreasonable");*Associated Ready Mix, Inc. v. Douglas*, 843 S.W.2d 758, 762 (Tex.Ct.App.1992) (a turnover action in which an opponent's causes of action against Party are assigned to Party, thus resulting in extinguishing the cause of action, does not accomplish the purpose of the turnover statute).[6] The same situation exists here. As noted above, the Idaho execution statutes are designed to allow a judgment creditor to seize property so that its judgment can be satisfied. *Williams*, 98 Idaho at 157, 559 P.2d at 1125. As with the Texas turnover statute in *Criswell,* it is an unreasonable abuse of the purpose of those statutes to employ them to extinguish a cause of action against the judgment creditor. As such, the Court should hold that the Van Engelens right to appeal from the very judgment that Washington Federal is trying to enforce is exempt from execution.

B. Permitting Washington Federal to Purchase the Cause of Action Against Itself Will Create an Absurdity and Render Other Statutes a Nullity

Washington Federal contends that it is entitled to execute upon the Van Engelens right to appeal the very judgment upon which it is attempting to execute under Idaho Code § 11-201, which provides that "[a]ll goods, chattels, moneys and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, are liable to execution;" and under I.C. § 11-301, which provides that "[t]he sheriff must execute the writ against the property of the judgment debtor by levying on a sufficient amount of property if there be sufficient; collecting or

---

6 These Texas authorities are particularly persuasive because under I.C. § 11-602, "Nonresidents are entitled to the exemptions provided by the law of the jurisdiction of their residence." The Van Engelens are no longer residents of Idaho, but of Texas.

selling the things in action, and selling the other property, and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment." It contends that as a "thing in action," the right to appeal is therefore subject to execution under the plain language of the statute. It asserts that because the right to appeal the judgment being executed upon is not expressly outlined in Idaho's exemption statutes, no exemption can be claimed. *See Hooper v. State*, 127 Idaho 945, 950, 908 P.2d 1252, 1257 (Ct. App. 1995) ("the general rule is that assets are not exempt from the claims of creditors unless specifically exempted by statute") (emphasis added).

However, while a Court must ordinarily give effect to the plain, unambiguous language of a statute, if the result is palpably absurd, the Court must engage in statutory construction. *Wheeler v. Idaho Dept. of Health and Welfare*,147 Idaho 257, 263, 207 P.3d 988, 994 (2009). Constructions of a statute that would lead to absurd or unreasonably harsh results are disfavored. *Payette River Property Owners Ass'n v. Board of Com'rs of Valley County*, 132 Idaho 551, 557, 976 P.2d 477, 483 (1999). This Court has a "duty to ascertain the legislative intent, and give effect to that intent." *Wheeler*,147 Idaho at 263, 207 P.3d at 994. The Court must construe a statute as a whole, and consider all sections of applicable statutes together to determine the intent of the legislature. *Id.* It is incumbent upon a court to give a statute an interpretation that will not render it a nullity. *Hecla Min. Co. v. Idaho State Tax Com'n*, 108 Idaho 147, 151, 697 P.2d 1161, 1165 (1985). "[The Court] also must take account of all other matters such as the reasonableness of the proposed interpretations and the policy behind the statute." *Wheeler*,147 Idaho at 263, 207 P.3d at 994.

If the Court permits the interpretation suggested by Washington Federal, such interpretation will lead to absurd and harsh results, be counter to the purpose of the execution

statutes, and render other applicable statutes a nullity. In a circular fashion, Washington Federal is attempting to execute upon the right to appeal the very judgment upon which Washington Federal predicates its right to execute. If the court approves of such a procedure, it will have accepted of a perverse new way for wealthy respondents to evade appellate review simply because poorer appellants are unable to post security or purchase their own right to appeal at a sheriff's sale. This is palpably absurd and deeply unjust.

Furthermore, this interpretation of the execution statues does not advance the policy behind those statutes. The purpose of the execution statutes is to enable a judgment creditor to satisfy his judgment. *Williams*, 98 Idaho at 157, 559 P.2d at 1125. The purpose of the procedure proposed by Washington Federal is not to satisfy the judgment, but rather to forever insulate that potentially erroneous judgment from appellate review. This is not a valid purpose, much less a purpose in keeping with the policy of the execution statutes.

This interpretation would also render other applicable statutes a nullity. First, under this interpretation, unless an appellant can obtain a stay of the writ of execution, he will have no functional ability to appeal. This would undermine a number of statutes and rules which govern appeals. Idaho Code § 13-201 and Idaho Appellate Rule 4 give any party aggrieved by an appellate judgment the right to appeal. Notably, these rules do not provide that the right to appeal exists only if the party can afford a supersedeas bond or other security. In addition, it would undermine I.A.R. 16(b), which provides a procedure whereby the party in whose favor an execution may issue may agree in writing that the party will not execute pending the appeal, in which case no supersedeas bond is necessary. If Washington Federal's interpretation of the execution statutes were allowed, no party would ever agree to such a waiver. If the other party

could not afford a supersedeas bond, then the judgment creditor could refuse to waive the bond and simply foreclose upon the right to appeal.

Given all of this, it cannot be concluded that the Legislature intended to permit a judgment creditor to use his judgment as a means to strip the judgment debtor of the right to appeal the judgment. The Court should not interpret the execution statute to permit this unjust result.

C. The Unpublished Order in *Smith v. Corlett* Provides no Guidance

Washington Federal cites to the case *Smith v. Corlett and Rosera*, (Ada County District Court Case No. CV OC 2008-09440) and an unpublished Supreme Court order (Supreme Court Docket No. 37060-2009) in support of its attempt to execute on the Van Engelens right to appeal. In that case, a plaintiff sued the defendant on various causes of action. On summary judgment, the district dismissed all claims filed by the plaintiff. (Aff. of Counsel, ¶ 6, Ex. D.) The Court awarded attorney fees and costs to the defendants in an amount exceeding $35,000 and entered a judgment for the same. (*Id.*) The plaintiff appealed the summary judgment entered in favor of the defendant. (*Id.* at ¶ 7, Ex. E.) Thereafter, the defendant levied against "the causes of action and choses in action held by Plaintiff," which included the plaintiff's right to appeal the judgment being executed upon. (*Id.* at ¶ 6, Ex. D). A sheriff sale was scheduled. (*Id.* at ¶ 8, Ex. F.) Plaintiff thereafter filed for and received a stay of this sale, contending that such a levy was illegal. (*Id.* at ¶ 9, Ex. G.) Without comment or analysis, in an unpublished Order signed by the Clerk of the Supreme Court, the stay imposed by the District Court was vacated. (Memorandum in Support of Plaintiff's Motion Contesting Defendants' Claim of Exemption, at the Exhibit Thereto.) The Clerk of the Supreme Court may have vacated the stay for any number of reasons, including improper procedure or waiver of the argument. Simply put, we cannot know why this

occurred, much less infer from this Order that the Supreme Court has or would approve of the procedure of foreclosing on the right to appeal in order to satisfy the judgment that is the very issue of the appeal. The Court should therefore disregard Washington Federal's citation to this unpublished order.

CONCLUSION

The Court should hold that, because of the absurd and unjust results which would occur if a party is able to execute upon a judgment by foreclosing its opponents right to appeal that very judgment, the Court should sustain the Van Engelens' claim of exemption.

DATED this 1st day of July, 2011.

Dara L. Parker
BANDUCCI WOODARD SCHWARTZMAN
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of July, 2011, a true and correct copy of the within and foregoing instrument was served upon:

David E. Wishney
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Facsimile (208) 336-5956
- ☐ Hand Delivery
- ☐ Overnight Delivery

Dara L. Parker

Thomas A. Banducci (ISB No. 2453)
tbanducci@bwslawgroup.com
Wade L. Woodard (ISB No. 6312)
wwoodard@bwslawgroup.com
Dara Parker (ISB No. 7177)
dparker@bwslawgroup.com
Banducci Woodard Schwartzman PLLC
802 W. Bannock St., Suite 500
Boise, ID 83702
Telephone: (208) 342-4411
Facsimile: (208) 342-4455

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	Case No. CV-OC 0917209 **AFFIDAVIT OF COUNSEL IN OPPOSITION TO PLAINTIFF'S MOTION CONTESTING CLAIM OF EXEMPTION**

County of Ada)
): ss
State of Idaho)

Dara L. Parker, first being duly sworn, subscribes and states as follows:

1. I am an attorney for Defendants in the above captioned case.

2. I make this affidavit upon my personal knowledge.

3. Attached hereto as Exhibit A is a true and correct copy of the Notice of Levy.

4. Attached hereto as Exhibit B is a true and correct copy of the Notice of Sheriff's Sale.

5. Attached hereto as Exhibit C is a true and correct copy of the Van Engelens' Supplemental Claim of Exemption.

6. Attached hereto as Exhibit D is a true and correct copy of the Notice of Levy filed in the case *Smith v. Corlett and Rosera*, (Ada County District Court Case No. CV OC 2008-09440).

7. Attached hereto as Exhibit E is a true and correct copy of the Notice of Appeal in the case *Smith v. Corlett and Rosera*, (Ada County District Court Case No. CV OC 2008-09440).

8. Attached hereto as Exhibit F is a true and correct copy of the Notice of Sheriff's Sale in the case *Smith v. Corlett and Rosera*, (Ada County District Court Case No. CV OC 2008-09440).

9. Attached hereto as Exhibit G is a true and correct copy of the Order Quashing Sheriff's Sale in the case *Smith v. Corlett and Rosera*, (Ada County District Court Case No. CV OC 2008-09440).

DATED this 1st day of July, 2011.

Dara L. Parker

SUBSCRIBED AND SWORN before me this 1st day of July, 2011

KERI FAIRCHILD NOTARY PUBLIC STATE OF IDAHO

Notary Public for Idaho
Residing at: Meridian ID
My commission expires: 10/3/2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of July, 2011, a true and correct copy of the within and foregoing instrument was served upon:

David E. Wishney
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Facsimile (208) 336-5956
- ☐ Hand Delivery
- ☐ Overnight Delivery

Dara L. Parker

EXHIBIT A

David E. Wishney, I.S.B. #1993
Chad E. Bernards, I.S.B. #7441
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701
Telephone: (208) 336-5955
Facsimile: (208) 336-5956

Attorneys for Washington Federal Savings

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States corporation, Plaintiffs, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	CASE NO. CV OC 09-17209 NOTICE OF LEVY

TO: H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN:

YOU WILL PLEASE TAKE NOTICE that by virtue of an Amended Judgment entered on December 14, 2010, District Court of the Fourth Judicial District for the County of Ada, State of Idaho, in the above-captioned action, Defendants H. Craig Van Engelen and Kristen Van Engelen, a married couple, owe, jointly and severally, the sum of $5,036,998.86, plus interest accruing thereon at the statutory rate, to Plaintiff Washington Federal Savings.

By virtue of a Writ of Execution issued in this action on May 12, 2011, I have this day levied upon all claims, causes of action, choses in action, defenses and/or affirmative defenses and rights to appeal, and all rights, title, and interest held by the Defendants H. Craig Van Engelen and Kristen Van Engelen in the litigation of Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Case No. CV 09-17209 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by H. Craig Van Engelen and Kristen Van Engelen in the matter known as Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Idaho Supreme Court Docket No. 38484-2011, to satisfy the amount of $5,148,304.26 due and owing under the foregoing judgment.

DATED THIS 14 day of ~~May~~ June, 2011.

Gary Raney, SHERIFF
CIVIL SECTION
7200 BARRISTER DR.
BOISE, IDAHO 83704

_____, Sheriff
Ada County, State of Idaho

By: K. Adams 4485
Deputy Sheriff

STATE OF IDAHO)
ss.
County of Ada)

On this 11th day of June, in the year 2011, before me, Michele Schlabach, a Notary Public in and for said state, personally appeared Kelly Adams, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

MICHELE SCHLABACH NOTARY PUBLIC STATE OF IDAHO

Michele Schlabach
NOTARY PUBLIC FOR IDAHO
Residing at Ada County, Idaho
My commission expires: 10-12-2012

EXHIBIT B

David E. Wishney, I.S.B. #1993
Chad E. Bernards, I.S.B. #7441
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701
Telephone: (208) 336-5955
Facsimile: (208) 336-5956

Attorneys for Washington Federal Savings

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States corporation, Plaintiffs, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	CASE NO. CV OC 09-17209 NOTICE OF SHERIFF'S SALE

*****

Under and by virtue of a money judgment rendered out of the above-captioned Court, which Judgment was entered on the 14th day of December, 2010, and the Writ of Execution being issue on the 12TH day of May, 2011, in the above-captioned action, wherein the above-named Plaintiff Washington Federal Savings obtained a money judgment against the above-named Defendants H. Craig Van Engelen and Kristen Van Engelen, jointly and

severally, for the sum of $4,996,101.65, together with an award of attorney's fees and cost for the sum of $40,897.21, together with post judgment interest in the amount of $111,303.40 being calculated at the statutory rate of 5.375% from December 14, 2010 through May 10, 2011, for a total sum of **$5,148,302.26**, together with accruing interests and costs, all of which are to be satisfied out of the proceeds of the claims, causes of action, choses in action, defenses and/or affirmative defenses, rights to appeal, and all rights, title, and interest held by Defendants H. Craig Van Engelen and Kristen Van Engelen in the litigation of Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Case No. CV 09-17209 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by H. Craig Van Engelen and Kristen Van Engelen in the matter known as Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Idaho Supreme Court Docket No. 38484-2011.

NOTICE IS HEREBY GIVEN, that on Thursday, the 7TH day of July, 2011, at 9:30 o'clock a.m./~~p.m.~~ of said day at the steps of the Public Safety Building located at 7200 Barrister Drive, Boise, Idaho 83704, I will in obedience to said Order, and Writ Of Execution, levy upon the claims, causes of action, choses in action, defenses and/or affirmative defenses, rights to appeal, and all rights, title, and interest held by Defendants H. Craig Van Engelen and Kristen Van Engelen in the

litigation of Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Case No. CV 09-17209 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title, and interest held by H. Craig Van Engelen and Kristen Van Engelen in the matter known as Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Idaho Supreme Court Docket No. 38484-2011, to satisfy the above-referenced money judgment, together with all interest thereon and costs of sale.

DATED THIS 20TH day of ~~May~~ June, 2011.

GARY RANEY, Sheriff
Ada County, State of Idaho

By: Diane Duncan
Deputy Sheriff

EXHIBIT C

Thomas A. Banducci (ISB No. 2453)
tbanducci@bwslawgroup.com
Wade L. Woodard (ISB No. 6312)
wwoodard@bwslawgroup.com
Dara Parker (ISB No. 7177)
dparker@bwslawgroup.com
BANDUCCI WOODARD SCHWARTZMAN PLLC
802 W. Bannock St., Suite 500
Boise, ID 83702
Telephone: (208) 342-4411
Facsimile: (208) 342-4455

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	Case No. CV-OC 0917209 SUPPLEMENTAL CLAIM OF EXEMPTION

TO: ADA COUNTY SHERIFF'S OFFICE
ATTN: CIVIL SECTION
7200 Barrister Dr.
Boise, ID 83704
Fax (208) 577-3759

In addition to the Claim of Exemption forwarded to the Ada County Sheriff's Office directly by Defendants H. Craig Van Engelen and Kristen Van Engelen ("the Van Engelens")

postmarked June 21, 2011, the Van Engelens claim exemption from the levy claims, causes of action, chooses in action, defenses and/or affirmative defenses, rights to appeal, and all rights, title, and interest held by them in the litigation of Washington Federal Saving, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Case No. CV OC 09-17209 in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada including any interest in the appeal of the foregoing litigation, specifically, any and all rights, title and interest held by the Van Engelen defendants in the matter known as Washington Federal Savings, a United States corporation vs. H. Craig Van Engelen and Kristen Van Engelen, Idaho Supreme Court Docket No. 38484-2011.

The Van Engelens request that, as required by Idaho Code, you notify the plaintiff within one business day of the filing of this claim of exemption. If the plaintiff does not within five (5) days following the same, file a motion with the court contesting this claim of exemption, you are required to release this property which has been levied upon. If the plaintiff does file a motion contesting the claim, please refrain from taking any actions upon this property until such time as the Court can rule.

DATED this 21st day of June, 2011.

Dara L. Parker
BANDUCCI WOODARD SCHWARTZMAN
Attorneys for Defendants

EXHIBIT D

TERRY C. COPPLE (ISB No. 1925)
ALEX P. MCLAUGHLIN (ISB No. 7977)
DAVISON, COPPLE, COPPLE & COPPLE, LLP
Attorneys at Law
Chase Capitol Plaza
Post Office Box 1583
199 North Capitol Boulevard
Suite 600
Boise, Idaho 83701
Telephone: (208) 342-3658
Facsimile: (208) 386-9428
tc@davisoncopple.com
mclaughlin@davisoncopple.com

Attorneys for Defendant Cathy Rosera
and Defendant/Third-Party Plaintiff Joe Corlett

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JAMES M. SMITH, a single person,	)	Case No. CV OC 0809440
Plaintiff,	)	
vs.	)	
CATHY ROSERA,	)	NOTICE OF LEVY
Defendant,	)	
And	)	
JOE CORLETT, a married person,	)	

Defendant, Third Party, Plaintiff,

vs.

ANTHONY C. D'ANGELO and JUDY L. D'ANGELO, husband and wife, and WHISTLER POINT, LLC, an Idaho limited liability company,

Third-Party Defendants.

* * *

TO: JAMES M. SMITH, a single person:

YOU WILL PLEASE TAKE NOTICE that by virtue of an execution issued out of the District Court of the Fourth Judicial District for the County of Ada, State of Idaho, in the above-entitled action, whereby Plaintiff James M. Smith, a single person, owes the sum of $36,489.41 now due and owing to Defendant Cathy Rosera and Defendant/Third-Party Plaintiff Joe Corlett. By virtue of that Supplemental Summary Judgment entered on January 15, 2010, in this action, I have this day levied upon the claims, causes of action and chooses in action held by Plaintiff James M. Smith in the litigation of James M. Smith, a single person, vs. Cathy Rosera, Defendant, and Joe Corlett, a married person, Defendant/Third-Party Plaintiff, vs. Anthony C. D'Angelo and Judy L. D'Angelo, husband and wife, and Whistler Point, LLC, an Idaho limited liability company, Third-Party Defendants, Case Number CV OC 0809440 pending in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada,

to satisfy the amount of $36,489.41 due and owing under the foregoing Judgment.

DATED this 14 day of ~~February~~ APRIL, 2010.

GARY RANEY, SHERIFF

Kelly ~~Adams~~ 4485

Sheriff

By K. Ce

Deputy Sheriff

EXHIBIT E

Bruce S. Bistline, ISB#1988
GORDON LAW OFFICES, CHTD.
623 West Hays Street
Boise, ID 83702-5512
Telephone: 208-345-7100
Facsimile: 208-345-0050

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JAMES M. SMITH, Plaintiff, vs. JOE CORLETT and CATHY ROSERA, Defendants.	CASE NO. CV OC 0809440 NOTICE OF APPEAL Filing Fee: $101.00
JOE CORLETT, Third Party Plaintiff, vs. ANTHONY C. D'ANGELO and JUDY D'ANGELO, husband and wife, and Whistler Point, LLC, an Idaho Limited Liability Company, Third Party Defendants.	

TO: THE ABOVE NAMED RESPONDENTS, JOE CORLETT AND CATHY ROSERA AND THE PARTY'S ATTORNEY TERRY C. COPPLE OF DAVISON, COPPLE, COPPLE & COX, LLP, AND THE CLERK OF THE ABOVE ENTITLED COURT. NOTICE IS HEREBY

ORIGINAL

GIVEN THAT:

1. The above named Appellant, James M. Smith, appeals against the above named Respondents to the Idaho Supreme Court from the Summary Judgment entered upon June 22, 2009, in which the Court ordered that all claims filed by Plaintiff/Appellant against Respondents Corlett and Rosera were dismissed with prejudice, which Judgment was subject to Plaintiff's Motion to Reconsider that was resolved by the Revised Decision and Order Re: Motion for Summary Judgment of the Honorable Deborah A. Bail, District Judge of the Fourth Judicial District, County of Ada, dated September 15th, 2009, in which the Court denied Plaintiff's Motion to Reconsider.

2. Pursuant to.Rule 11(a)(1) I.A.R.. Appellant has a right to appeal Revised Decision/Order described in ¶ 1 above to the Idaho Supreme Court because the order is a final order in that it adjudicates all of the subject matter of the controversy (other than claims for fees and costs).

3. The issue presented on this appeal include but are not limited to:

   a. Whether the District Court erred in holding that Appellant had failed to demonstrate the existence of evidence and reasonable inferences to support a determination that he had an enforceable commission fee splitting agreement with Respondent Rosera acting on behalf of Respondent Corlett which entitled Appellant to receive a share of the commission in the event that his efforts lead to the sale of the property at issue.

   b. Whether the District Court erred in holding that Appellant had failed to demonstrate the existence of evidence and reasonable inferences to support a determination his efforts lead to the sale of the property at issue.

c. Whether the District Court erred in holding that Appellant had failed to demonstrate the existence of evidence and reasonable inferences to support a determination that Respondent Rosera told him a material lie when she represented that she had an "exclusive listing" agreement with the seller when in fact no such agreement existed.

d. Whether the District Court erred in holding that Appellant had failed to demonstrate the existence of evidence and reasonable inferences to support a determination that Appellant was injured and caused damage by virtue of Respondent Rosera's lie.

e. Whether the District Court erred in holding that Appellant was precluded from asserting a fraud claim against Respondent Rosera by virtue of the fact that he had no written agreement with Respondent Corlett as required by I.C. § 54-2054(8) pertaining to "after-the-fact referral fees."

f. Whether the District Court erred in holding that the tort of negligent misrepresentation could not properly be extended to the professional relationship between two licensed real estate sales persons.

4. No evidentiary proceedings were held and a Transcript is not requested.

5. A standard Clerk's Record as identified in I.A.R. 28(b) is requested by Appellant. Pursuant to I.A.R. 28(c), Appellant requests that the following additional items be forwarded to the Supreme Court to be lodged as exhibits:

a. Motion for Summary Judgment filed on or about the 8th day of October, 2008.

b. Brief in Support of Defendant Joe Corlett's Motion for Summary Judgment filed

on or about the 8th day of October, 2008.

c. Affidavit of Cathy Rosera filed on or about the 8th day of October, 2008.

d. Affidavit of David Dufenhorst filed on or about the 10th day of October, 2008.

e. Plaintiff's Memorandum in Opposition to Defendant Corlett's Motion for Summary Judgment filed on or about the 21st day of January, 2009.

f. Affidavit of James M. Smith in Support of Memorandum in Opposition of Defendant Corlett's Motion for Summary Judgment filed on or about the 21st day of January, 2009.

g. Affidavit of Bruce S. Bistline in Support of Memorandum in Opposition of Defendant's Motion for Summary Judgment filed on or about the 21st day of January, 2009.

h. Notice of Filing of the Deposition of David M. Duffenhorst, filed on or about the 23rd day of January, 2009.

i. Notice of Filing of the Deposition of Barrett Sigmund, filed on or about the 23rd day of January, 2009.

j. Supplemental Affidavit of Cathy Rosera filed on or about the 2nd day of February, 2009.

k. Supplement[sic] Brief of Defendant Joe Corlett filed on or about the 2nd day of February, 2009.

l. Affidavit of James M. Smith verifying Plaintiff's Amended Complaint in CV OC 0901945 filed on or about the 4th day of February, 2009

m. Respondent Rosera's Joinder in Motion for Summary Judgment of Joe Corlett filed on our about the 24th day of February, 2009.

n. Motion for Summary Judgment filed on or about the 12th day of March, 2009.

o. Affidavit of Cathy Rosera in Support of Motion for Summary Judgment filed on or about the 12th day of March, 2009.

p. Brief in Support of Cathy Rosera's Motion for Summary Judgment filed on or about the 12th day of March, 2009.

q. Plaintiff James Smith's Response Memorandum to Defendant Cathy Rosera's Motion for Summary Judgment filed on or about the 23rd day of March, 2009.

r. Affidavit of Paul R. Basom Re: Defendant Rosera's Motion for Summary Judgment filed on or about the 23rd day of March, 2009.

s. Motion to Reconsider Decision and Order Re: Motions for Summary Judgment of the Defendants Rosera and Corlett filed on or about the 24th day of June, 2009.

t. Affidavit of James M. Smith in Support of Motion to Reconsider filed on or about the 24th day of June, 2009.

u. Affidavit of Bruce S. Bistline in Support of Motion to Reconsider filed on or about the 24th day of June, 2009.

v. Defendants' Response to Plaintiff's Motion to Reconsider.

6. To the knowledge of the undersigned nothing was filed under seal and no orders were filed sealing any portion of the transcript.

7. I certify:

a. That service of this Notice of Appeal has not been made upon the Reporter who transcribed any of the proceedings in this matter and no estimated fee has been tendered for the preparation of a transcript for the reason that no transcript of any proceeding has been requested.

b. That the Clerk of the District Court has been paid the estimated fee for the preparation of the Clerk's record in the amount of $100.00.

c. The appellate filing fee has been paid.

d. That, as refleced in the attached Certificate of Service, service has been made on all parties as required by I.A.R. 20.

DATED this 23rd day of October, 2009.

GORDON LAW OFFICES, CHTD.

By Bruce S. Bistline - Of the Firm
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2009, I caused the foregoing to be delivered by the method indicated below and addressed to the following:

Terry C. Copple
Davison, Copple, Copple & Cox, LLP
Washington Mutual Capitol Plaza
PO Box 1583
199 Capitol Blvd, Suite 600
Boise, Idaho 83701

____ HAND DELIVERED
____ U.S. MAIL
____ OVERNIGHT MAIL
__X__ FACSIMILE 208-386-9428

William R. Snyder
Leo P. Shishmanian
William R. Snyder & Associates, PA
520 West Franklin Road, Upper Level
P.O. Box 2338
Boise, Idaho 83702

____ HAND DELIVERED
____ U.S. MAIL
____ OVERNIGHT MAIL
__X__ FACSIMILE 208-343-4539

Bruce S. Bistline

EXHIBIT F

TERRY C. COPPLE (ISB No. 1925)
ALEX P. MCLAUGHLIN (ISB No. 7977)
DAVISON, COPPLE, COPPLE & COPPLE, LLP
Attorneys at Law
Chase Capitol Plaza
Post Office Box 1583
199 North Capitol Boulevard
Suite 600
Boise, Idaho 83701
Telephone: (208) 342-3658
Facsimile: (208) 386-9428
tc@davisoncopple.com
mclaughlin@davisoncopple.com

Attorneys for Defendant Cathy Rosera
and Defendant/Third-Party Plaintiff Joe Corlett

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JAMES M. SMITH, a single person,	)	Case No. CV OC 0809440
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CATHY ROSERA,	)	NOTICE OF SHERIFF'S SALE
	)	
Defendant,	)	
	)	
	)	
And	)	
	)	
JOE CORLETT, a married person,	)	

liability company, Third-Party Defendants, Case Number CV OC 0809440 pending in the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada.

NOTICE IS HEREBY GIVEN, that on Tuesday, the 4~~0~~th day of May, 2010, at 9:30 o'clock a.m./~~p.m.~~ of said day at the steps of the Public Safety Building located at 7200 Barrister Drive, Boise, Idaho 83704, I will in obedience to said Supplemental Summary Judgment, and Writ Of Execution, I will levy on the described claims, causes or action and chooses in action held by Plaintiff James M. Smith to satisfy the above-mentioned Supplemental Summary Judgment, together with all interest thereon and costs of sale.

DATED this 14th day of ~~February~~ April, 2010.

GARY RANEY, Sheriff
Ada County, Idaho

By Diane Skinner
Deputy Sheriff

EXHIBIT G

NO. FILED
A.M. P.M. 3:13
MAY 03 2010
DAVID NAVARRO, Clerk
By DEPUTY

Bruce S. Bistline, ISB#1988
GORDON LAW OFFICES, CHTD.
623 West Hays Street
Boise, ID 83702-5512
Telephone: 208-345-7100
Facsimile: 208-345-0050

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

JAMES M. SMITH, Plaintiff, vs. JOE CORLETT and CATHY ROSERA, Defendants.	CASE NO. CV OC 0809440 ORDER QUASHING SHERIFF'S SALE AND SETTING MATTER FOR HEARING IN PLAINTIFFS MOTION TO QUASH NOTICE OF LEVY
JOE CORLETT, Third Party Plaintiff, vs. ANTHONY C. D'ANGELO and JUDY D'ANGELO, husband and wife, and Whistler Point, LLC, an Idaho Limited Liability Company, Third Party Defendants.	

Telephonically Lab

This matter having come before the Court upon Plaintiff's *Motion for Order*

Temporary Stay of Sheriff's Sale and Motion for Order Quashing Notice of Levy and supported by the Affidavit of Bruce S. Bistline and the Court having reviewed the matter and being fully advised in the premises:

1. It is hereby ordered and this does order that the Sheriff's sale set, in this action, for May 4, at 9:30 in the morning, is hereby Stayed pending further order of this Court.

2. That the parties appear before the Court on June 9th at 2:30 PM to present any argument they may have on Plaintiff's Motion to Quash Notice of Levy. If Plaintiff wishes to file a brief in support of this Motion he must do so before at least ~~days before the hearing~~. If Defendants which to file a responsive brief they must do so at least ~~days before the hearing~~. Any reply brief ~~must be filed at least~~ days before the hearing.

DATED this 3rd day of May, 2010.

Judge Deborah A. Bail

Thomas A. Banducci (ISB No. 2453)
tbanducci@bwslawgroup.com
Wade L. Woodard (ISB No. 6312)
wwoodard@bwslawgroup.com
Dara Parker (ISB No. 7177)
dparker@bwslawgroup.com
Banducci Woodard Schwartzman PLLC
802 W. Bannock St., Suite 500
Boise, ID 83702
Telephone: (208) 342-4411
Facsimile: (208) 342-4455

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	Case No. CV-OC 0917209 **MEMORANDUM IN SUPPORT OF MOTION TO WAIVE REQUIREMENT OF SUPERSEDEAS BOND AND STAY EXECUTION AND/OR ENFORCEMENT OF THE JUDGMENT**

Defendants H. Craig Van Engelen and Kristen Van Engelen ("the Van Engelens") submit this Memorandum in Support of their Motion to waive the requirement of a supersedeas bond and stay execution and/or enforcement of the judgment pending appeal.

INTRODUCTION

As this Court is aware, in the underlying action, it granted summary judgment in favor of Plaintiff Washington Federal Savings ("Washington Federal" or "the Bank") and entered judgment in favor of the Bank in the amount of $5,036,998.86. (Amended Judgment, filed

January 27, 2011.) Because of their financial condition, the Van Engelens were unable to post a supersedeas bond to stay execution during the pendency of appeal, but have nevertheless appealed the judgment to the Idaho Supreme Court. (Notice of Appeal, filed January 25, 2011.) In another motion currently pending before the Court, Washington Federal is attempting to execute upon the Van Engelens' right to appeal in this very case. (Washington Federal's Motion Contesting Claim of Exemption, filed June 28, 2011.) Given the Van Engelens' inability to afford a supersedeas bond and this attempt to foreclose their right to appeal, this Court should grant the Van Engelens' Motion to waive the requirement of a supersedeas bond and stay execution of the judgment.

ARGUMENT

Pursuant to Idaho Code § 13-202, after an appeal of a judgment in a civil action, the district court may stay execution upon that judgment, including waiving the supersedeas bond or cash deposit requirements of Idaho Appellate Rule 13(b)(15). Such a waiver of security may be granted for "good cause shown." I.C. § 13-202(4). Ample "good cause" exists in the present case.

A. The Van Engelens are Unable to Afford a Supersedeas Bond

The Van Engelens are unable to afford a supersedeas bond or cash deposit, which would ordinarily serve to stay execution on the Court's judgment during the pendency of their appeal to the Idaho Supreme Court. I.A.R. 13(b)(15). The Van Engelens were employed as land developers for decades. (Affidavit of H. Craig Van Engelen In Support Of Motion To Waive Requirement Of Supersedeas Bond And Stay Execution and/or Enforcement Of The Judgment, ¶ 5.) The economic downturn destroyed their business. (*Id.*) As such, they have significant liabilities. In addition to the $6 million debt owed to Washington Federal Savings which is at

issue in this lawsuit, they owed approximately $2 million to Mountain West Bank, $1 million to Home Federal Bank, and at least $13 million to Bank of the Cascades. (*Id.* at ¶ 6.) They were engaged in litigation with Mountain West Bank and Home Federal Bank, but as they had valid personal guarantees with those banks and were able to settle by transferring many of their remaining business assets. (*Id.*) The $13 million debt to Bank of the Cascades is still outstanding. (*Id.*) In addition to these liabilities, they have liabilities for other debts in an amount exceeding $1 million. (*Id.* at ¶ 7.) These liabilities exceed their very limited remaining assets. (*Id.* at ¶ 8.) Moreover, their income has been devastated by the economic downturn. They have had no positive income (and in fact, substantial negative income) for the past five years. (*Id.* at ¶ 9.) Given their financial condition, they knew they would be unable to qualify for a supersedeas bond in the amount of $6,850,318.26 or post a cash deposit to cover the $5,036,998.86 judgment. (*Id.* at ¶ 10-11.) Their inability to afford such security is now being unfairly and unconstitutionally used against them to foreclose their right to appeal the very judgment being executed upon. For these reasons, explained in detail below, the Court should waive the requirement of a supersedeas bond and order a stay of execution.

B. Washington Federal is Attempting to Execute Upon the Van Engelens' Right to Appeal the Judgment

The Van Engelens were aware that, without a stay of judgment which they could not afford to obtain, Washington Federal could execute upon that judgment during the appeal. Nevertheless, they were content in the knowledge that if the Idaho Supreme Court reversed the judgment, they would be entitled to a return of their property. As the Idaho Supreme Court has long held:

> While it is true that an appeal does not operate to stay the enforcement of a money judgment, no supersedeas bond being given, still it is equally true that an execution issued upon such judgment, and all proceedings had thereunder, are

> dependent for their validity upon the judgment being sustained. If property has been taken under such execution [later found upon appeal to be invalid], restitution must be made. The judgment which alone authorized the garnishment, being erroneous, all proceedings had thereunder are, as between the immediate parties, ipso facto void and of no effect.

Radermacher v. Eckert, 63 Idaho 531, 123 P.2d 426, 429 (1942). Then, stunningly, the Van Engelens received notice that Washington Federal was attempting to execute upon the judgment by foreclosing upon their right to appeal that very judgment. As outlined in extensive length in the Van Engelens' Opposition to the Plaintiff's Motion Contesting Claim of Exemption (Opposition to Plaintiff's Motion Contesting Claim of Exemption, filed July 1, 2011), which is incorporated herein by reference in its entirely, if such a procedure is allowed in Idaho, the only party who has the right to appeal a potentially erroneous decision is a party who has enough money to post a supersedeas bond. This is a palpably absurd and deeply unjust result that cannot stand. The injustice which would flow from Washington's Federal expressly stated intention of purchasing (and then dismissing) the appeal of the very judgment upon which it is attempting to execute provides ample "good cause" for the Court to waive the requirement of a supersedeas bond and order a stay of execution until the Supreme Court has the opportunity to rule upon the merits of the appeal.

C. Requiring a Supersedeas Bond Under the Present Circumstances is an Unconstitutional Deprivation of Due Process

Although fairness alone provides sufficient good cause for the Court to grant the Van Engelens' motion, there is an even more compelling reason for doing so: requiring a supersedeas bond under these circumstances would be an unconstitutional deprivation of due process under the Fifth and Fourteenth Amendments of the Federal Constitution, and Article I Sections 13 and 14 of the Idaho Constitution. Under both the Federal and Idaho constitutions, states are not required to provide for the right to appeal, *Abney v. U. S.* 431 U.S. 651, 656, 97 S.Ct. 2034,

2038 (1977) and *State v. Moran-Soto*, 150 Idaho 175, 244 P.3d 1261 (Ct. App. 2010). Once an appellate procedure is provided by a state, however, such procedure must meet the constitutional requirements of due process. *Dowd v. United States ex rel. Cook*, 340 U.S. 206, 71 S.Ct. 262, 95 L.Ed. 215 (1951); *Gardner v. State*, 91 Idaho 909, 435 P.2d 249 (1967). "The elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case." *Foster v. Walus*, 81 Idaho 452, 456, 347 P.2d 120, 122 (1959). In fact, due process requires that, once the state has created a right of appeal, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts v. Lucey*, 469 U.S. 387, 841, 105 S.Ct. 830, 840, 83 L.Ed.2d 821 (1985).

If requiring a supersedeas bond would interfere with that right, then it constitutes a deprivation of due process. The case *Texaco Inc. v. Penzoil Co.*, 784 F.2d 1133, (2d Cir. 1986) *overruled on procedural grounds*, 481 U.S. 1 (1987), is illustrative of this point. In that case, Pennzoil obtained a judgment against Texaco in the sum of $11.12 billion. As in Idaho, a Texas rule provided that, in order to stay execution during the pendency of an appeal, Texaco would be required to post a supersedeas bond in the amount of the judgment plus other costs. As the supersedeas bond exceeded $12 billion, it was impossible for Texaco to meet the bond requirement without causing illiquidity and bankruptcy. The Second Circuit held that under these circumstances, the Texas bonding requirement so undermined the effectiveness of any appeal that it was a violation of due process. *Id.* at 1154. The present case is even more compelling. In *Texaco v. Penzoil*, Texaco's inability to afford a supersedeas bond merely made the appeal futile. Here, the Van Engelens' inability to afford a supersedeas bond will cause them to lose the right entirely. *See also Pleasant v. Evers*, 1998 WL 205431 (E.D.Pa., 1998)

(supersedeas bond requirement, as applied to indigent tenants unable to enter the necessary security, violates procedural and substantive due process under the Fourteenth Amendment to the United States Constitution.)

In this case, under Washington Federal's interpretation of the execution statutes, the only way for the Van Engelens to preserve their right to appeal would be to post a cash deposit or supersedeas bond to secure over $5 million, which they cannot afford. As such, the bonding requirement interferes with their right to appeal in violation of due process under the Federal and Idaho Constitutions. Under these circumstances, there is more than sufficient good cause for the Court to waive the requirement of a supersedeas bond and order a stay of execution until the Supreme Court has the opportunity to rule upon the merits of the appeal. Indeed, the Court must do so in order to preserve the Van Engelens' constitutional rights.

CONCLUSION

For these reasons, the Van Engelens respectfully request this Court to waive the requirement of a supersedeas bond and order a stay of execution of the judgment until the Supreme Court has the opportunity to rule upon the merits of the appeal.

DATED this 6th day of July, 2011.

BANDUCCI WOODARD SCHWARTZMAN PLLC

Dara L. Parker
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of July, 2011, a true and correct copy of the within and foregoing instrument was served upon:

David E. Wishney
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Facsimile (208) 336-5956
- ☐ Hand Delivery
- ☐ Overnight Delivery

Dara L. Parker

David E. Wishney, I.S.B. #1993
Chad E. Bernards, I.S.B. #7441
Attorneys and Counselors at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701
Telephone: (208) 336-5955
Fax: (208) 336-5956

Attorneys for Plaintiff Washington Federal Savings

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN L. VAN ENGELEN, Defendants.	CASE NO. CV OC 0917209 **MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO WAIVE REQUIREMENT OF SUPERSEDEAS BOND AND STAY EXECUTION AND/OR ENFORCEMENT OF THE JUDGMENT**

COMES NOW the Plaintiff, WASHINGTON FEDERAL SAVINGS ("Washington Federal"), by and through its counsel of record, and submits this Memorandum in Opposition to Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of Judgment (herein "Defendants' Motion").

I.
RELEVANT FACTUAL BACKGROUND

The undisputed facts relevant for the purposes of the Defendants' Motion are as follows:

1. On November 12, 2010, this Court granted Plaintiff's Motion for Summary Judgment against the individual Defendants and a money judgment in the amount of $4,996,101.65 was entered on December 14, 2010. After application for and the entry of an order for fees and costs in favor of Washington Federal, an Amended Judgment in the amount of $5,036,998.86 was entered on January 27, 2011 (hereinafter "Judgment").

2. On or about December 16, 2010, by way of letter from the Defendants' counsel, Defendants requested that Washington Federal waive the supersedeas bond requirement in order to stay execution of the Judgment. Washington Federal subsequently declined to waive the supersedeas bond.

3. On January 25, 2011, Defendants' filed a Notice of Appeal from the Court's granting of Washington Federal's Motion for Summary Judgment.

4. On May 12, 2011, a Writ of Execution was issued. Thereafter, Washington Federal's counsel prepared a letter of instruction to the Ada County Sheriff requesting the Sheriff to levy upon and sell all claims, causes of action, choses in action, defenses and/or affirmative defenses, rights to appeal, and all rights, title, and interest held by the Defendants/Appellants in the above-entitled action (collectively "Appeal Rights"). Following levy, a Sheriff's sale of the Appeal Rights was set for July 7, 2011.

5. On June 21, 2011, the Defendants filed a Claim of Exemption and Supplemental Claim of Exemption, wherein the Defendants asserted that the Appeal Rights were exempt from

levy.

6. On June 28, 2011, Washington Federal filed a motion and supporting memorandum contesting the Defendants' claim of exemption with respect to the Appeal Rights, and the matter was noticed for hearing before this Court for July 7, 2011.

7. On July 6, 2011, Defendants filed a motion, along with supporting affidavit and memorandum, to (i) waive requirement of a supersedeas bond; and (ii) stay execution and/or enforcement of the judgment ("Joint Motion").

8. On July 7, 2011, the District Court took up Washington Federal's motion contesting the Defendants' claim of exemption regarding the Appeal Rights. At said hearing, the Court reserved ruling on the same until Defendants' Joint Motion could be heard. The District Court set a briefing schedule for Washington Federal's response brief (July 15, 2011) and Defendants' reply brief (July 22, 2011). The Joint Motion is currently set for hearing on August 4, 2011.

9. To date, the Defendants have poster neither a cash deposit or supersedeas bond to stay execution or enforcement of the Judgment.

10. To date, the Defendants have paid nothing on the Judgment.

II.
PROCEDURAL HISTORY OF *SMITH v CORLETTE & ROSERA*

Initially, in response to the Court's inquiry regarding the results of the *Smith v. Corlett* and *Rosera* matter, (Ada County District Court Case No. CV OC 2008-09440; Supreme Court Docket No. 37060-2009), a review of the Court files reveals the following procedural history:

- On September 15, 2009, (after a motion for reconsideration was filed), the District Court entered a revised decision and order on summary judgment reaffirming the

Court's earlier dismissal of Smith's claims against Rosera.

- On October 23, 2009, Smith appealed to the Idaho Supreme Court.
- On December 16, 2009, the District Court entered its decision and order granting Rosera's request for attorney's fees and costs in the sum of $36,392.04.
- Pursuant to a writ of execution the Ada County Sheriff to levied upon Smith's choses in action, including Smith's appeal rights, and a Sheriff's sale set for May 4, 2010.
- On May 3, 2010, Smith filed an ex-parte motion for order temporarily staying the May 4th Sheriff's sale and a motion for order quashing the notice of levy.
- Following a telephonic hearing on May 3, 2010, the District Court entered an Order staying the execution sale pending further order of the Court.
- On May 18, 2010, Smith filed a motion with the District Court to stay execution as to Smith's causes of action against Rosera.
- Following a hearing held on June 9, 2010, the District Court entered an Order on June 10, 2010, granting Smith's motion to stay execution and to quash the levy.[1]
- On June 16, 2010, Rosera filed an application with the Supreme Court to vacate the stay imposed by the District Court.
- On June 30, 2010, Smith filed with the Supreme Court (1) an application for order staying execution as to Smith's rights; and (2) a memorandum in response to Rosera's application to vacate the District Court's stay order.

[1] *See* Affidavit of Counsel, Ex. 1 attached thereto.

- On September 22, 2010, the Idaho Supreme Court entered an order granting Rosera's application to vacate the District Court's stay order.[2]
- The Sheriff's execution sale was re-scheduled for February 10, 2011.
- On January 24, 2011, Smith filed with the Idaho Supreme Court: (1) an application to stay the February 10, 2011 Sheriff's sale; (2) a second application to stay the Sheriff's sale and all attempts to execute upon the judgment and levying upon Smith's rights in the action; and (3) a verified application for waiver of bond on the grounds of indigence, and supporting memorandum.
- On January 28, 2011, Rosera filed objections to Smith's stay applications and request for bond waiver.
- On January 31, 2011, the Supreme Court entered an Order Denying Application for Stay filed by Smith.[3]
- At the February 10, 2011 execution sale, Rosera and Corlett purchased Smith's "choses in action", including Smith's appeal rights in the underlying action, for a credit bid in the sum of $500.00.[4]
- On February 11, 2011, Rosera filed a motion to dismiss Smith's appeal, which was followed by Smith's objection to the same.

---

[2] *See* Affidavit of Counsel, Ex.2 attached thereto.

[3] *See* Affidavit of Counsel, Ex.3 attached thereto.

[4] *See* Affidavit of Counsel, Exs. 4 and 5 attached thereto.

- On March 8, 2011, the Idaho Supreme Court entered an Order granting Rosera's motion to dismiss Smith's appeal.[5]

It should be noted that review of the Idaho Supreme Court file on this matter reveals, as confirmed by a Deputy Clerk, that the Court's Orders vacating the District Court's stay and denying Smith's applications to stay execution and bond waiver, were indeed reviewed and voted upon by the Justices of the Court, and were not merely actions of the Court Clerk.

III.
ARGUMENT

1. The Requirement of a Supersedeas Bond is Not an Unconstitutional Deprivation of Due Process.

The Fourteenth Amendment to the United State Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. XIV. First, it should be noted that the Defendants' due process argument, in and of itself, concedes that their appeal rights in this case is property under Idaho law subject to levy and sale. Said differently, if no property right exists in the first instance, then it necessarily follows that there could be no deprivation of due process in the taking of (non-existent) property. Second, the 14th Amendment to the United States Constitution, as clearly stated in its text, does not prohibit the taking of property. Rather, it only prohibits the taking of property without due process.

Due process is both procedural and substantive in nature. *Rammell v. Idaho State Dept. of Agriculture*, 147 Idaho 415, ___, 210 P.3d 523, 528 (2009). Generally, as long as the party is

[5] *See* Affidavit of Counsel, Exs. 6 and 7 attached thereto.

afforded an opportunity to be heard "at a meaningful time and in a meaningful manner" due process requirements are met. *Id.* Procedural due process requires some process to be in place to ensure that an individual's rights are not arbitrarily deprived in violation of the state or federal constitutions. *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999). The concept of due process is a flexible concept, not to be applied rigidly, calling for procedural protection warranted by particular situations. *Id.*

The relevant process in the case at bar involves Idaho's levy and execution procedures. As previously briefed at length in Washington Federal's Memorandum in Support of Plaintiff's Motion Contesting Defendants' Claim of Exemption, Idaho law permits non-exempt property (including "things in action") to be seized and levied upon. The Defendants' are then afforded the opportunity to file a claims of exemption for exempt property. Pursuant to Idaho law, Washington Federal then filed its motion contesting the Defendants' claim of exemption. If indeed this Court rules that the Defendants' appeal rights are not exempt under Idaho law, then Washington Federal can proceed with the Sherriff's sale, at which the Defendants themselves are allowed to bid. If Washington Federal or a third-party outbid the Defendants, then said appeal rights will no longer be owned by the Defendants. While this may be to the Defendants' detriment, it will not be the result of inadequate process. Accordingly, there is no denial of procedural due process in the instant case.

While not specifically delineated in their memorandum, Defendants' due process argument appears to raise questions of a substantive nature. Substantive due process embraces the right of persons to be free "from arbitrary deprivations of life, liberty, or property." *State v. Reed*, 107 Idaho 162, 167, 686 P.2d 842, 847 (Ct. App. 1987) (emphasis added).

In support of their due process argument, the Defendants' rely heavily upon *Texaco Inc. v. Penzoil Co.*, 784 F.2d 1133 (2d Cir. 1986) for the proposition that the requirement of a supersedeas bond to stay execution of a judgment deprives them of due process simply because they are too poor to afford one. Glaringly absent from the Defendants' citation to *Texaco* is the fact that the Court ultimately held that the U.S. District Court did not err in requiring Texaco to post $1 billion in security. *Texaco* 784 F.2d 1133 at 1157 ("We also conclude that the issuance of preliminary injunctive relief and requirement of $1 billion security as a condition thereof did not constitute an abuse of discretion."). In fact, the *Texaco* Court held that the Texas lien and bond provisions were only unconstitutional as applied. *Id.*

The *Texaco* Court's ruling was very fact specific to the unique and extraordinary circumstances involved therein, as reflected in the following excerpts:

> We hasten to note that our decision rests partly upon the extraordinary circumstances of this case, which are unlikely ever again to occur... *Id.* at 1150.

> [O]urs is a narrow holding limited to the unusual circumstances of this case. The Texas lien and bond provisions will in most other circumstances continue to be respected and enforced as written by the Texas legislature and the Texas Supreme Court. Thus our decision does not prevent the state from enforcing the policy behind the Texas lien and bond provisions, which is to insure that a judgment creditor's interest in a judgment will be protected during the pendency of an appeal. *Id.* at 1157.

The extraordinary circumstances presented in this case included the shying away of suppliers, joint venturers, and purchasers of Texaco assets, downgrading of Texaco's bonds, its withdrawal from the commercial paper market, and an inability to secure financing from lending institutions

with which it had historied business relations. *Id.* at 1139, 1152.[6] In essence Texaco would come to a standstill and its operations would completely shut down which results would "be catastrophic for thousands of Texaco employees, stockholders and suppliers located throughout the United States and world-wide and would threaten serious harm to the national economy and the public." *Id.* at 1140.

Simply stated, the extraordinary circumstances and potential catastrophic results existing in the *Texaco* case are not present here. Moreover, and notwithstanding the unprecedented circumstances presented in *Texaco*, the Court still permitted a $1 billion bond to stand in order to meet the purposes behind the requirement of supersedeas bond, in part to protect judgment creditors as much as possible. The *Texaco* Court opined that "A full supersedeas bond may be required 'where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable', whereas no bond or a reduced bond would suffice when the creditor's interest, due to unusual circumstances, would not be unduly endangered." *Id.* at 1154-55 (cite omitted)..

The *Texaco* Court went on to state that there was no real dispute that Texaco could liquidate its assets to pay the judgment in full and that Penzoil's interest in protecting the full amount of its

---

[6] At the hearing upon Texaco's application for preliminary relief from execution upon the judgment, the U.S. District Court took evidence into consideration in ruling upon the irreparable injury and devastating impact that would result in the event the injunction was not granted. In stark contrast, the Van Engelens have provided no evidence to suggest that catastrophic consequences would result should they not be able to post the required bond or cash deposit (other than their claim of poverty). In fact, any injury should be minimized in light of their assertion that exclusive of Washington Federal's judgment, they have liabilities exceeding $14 million with no way to pay for the same. Said differently, based upon Defendants' admitted financial circumstances, their liabilities totaling $14 million (exclusive of Washington Federal's judgment) and $19 million plus (inclusive of the judgment) are of no consequence as they are financially unable to service either debt amount.

judgment was reasonably secured by the substantial excess of Texaco's net worth over and above the amount of Penzoil's judgment. *Id.* at 1155. Here, the Defendants admit that (1) their liabilities far exceed their very limited remaining assets; (2) they transferred many of their remaining assets to satisfy debts with Mountain West Bank and Home Federal Bank; (3) they have additional liabilities for other debts exceeding $14 million; and (4) they have had negative income for the past five years.[7] Thus, Washington Federal has no reasonable likelihood of collecting upon its judgment by the Defendants' own admission, thereby defeating any purpose in reducing the full supersedeas amount.

Further, according to *Texaco,* it is not reversible error for a district court to reduce a bond requirement amount to afford a judgment creditor some reasonable likelihood of recovering at least a portion of its judgment. In any event, the *Texaco* Court does not hold for the position that a supersedeas bond requirement staying execution upon a judgment rises to a deprivation of due process under the facts presented in the instant case. Contrarily, as cited above, the bond requirement is to be respected and enforced as written "in most other circumstances."

Herein, the Defendants argue strenuously that a judgment creditor should not be permitted to execute upon the appeal rights of the judgment debtor in the same action. This argument suggests that the judgment creditor {Washington Federal} should be treated differently than a third party judgment creditor who levies upon and sells the same Appeal Rights. (While the market for such rights might be limited, they would have obvious "avoidance cost" value to Washington Federal

---

[7] *See* Affidavit of H. Craig Van Engelen supporting Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, ¶¶ 6, 7, 8 and 9.

because it would be relieved of (a) the expense of appeal, and (b) the risk of an adverse decision upon appeal resulting in additional expense at the District Court level). If the actions of a third party judgment creditor did not violate principles of due process, then why would Washington Federal's intended course of action violate such principles? The analysis urged by the Defendants, lends itself to a result that is focused on the identify of the parties involved and not upon the process involved. While Washington Federal is aware of case law in other jurisdictions permitting execution upon an opponent's appeal rights, it is unaware of any rulings finding a violation of due process under the facts as presently before the Court. Neither a procedural nor substantive due process right is implicated in requiring the Defendants to post a supersedeas bond to stay execution of the judgment. Therefore, the Defendants' motion to stay execution of the judgment should be denied.

2. Good Cause Does Not Exists for the Court to Waive the Requirement of a Supersedeas Bond.

The Defendants' claim for "good cause" boils down to their claim of poverty. The financial inability, in and of itself, is not sufficient cause to waive the supersedeas bond requirement. If this were the case, who wouldn't qualify for such a waiver. While the Defendants' have asserted conclusory statements that they have very limited assets, they fail to provide the Court with any specifics on their remaining assets.[8] In essence, the Court is being asked to waive an appeal bond without full disclosure. If the Court finds that a judgment debtor can simply side step the bond requirement by claiming "no money", most, if not all, judgment debtors with sizable judgments can avoid posting a bond, which in turn, negates the purposes behind the bond requirement in protecting judgment debtors and providing security in collection upon their judgment. According, good cause

[8] *Id.*

does not exist for the Court to waive Defendants' bond requirement.

IV.
CONCLUSION

For the reasons outlined above, Washington Federal requests this Court deny Defendants' motions to waive the supersedeas bond requirement and stay execution and/or enforcement of the judgment.

Respectfully submitted this 15 day of July, 2011.

Chad E. Bernards
Attorney for the Plaintiff
Washington Federal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document entitled **MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO WAIVE REQUIREMENT OF SUPERSEDEAS BOND AND STAY EXECUTION AND/OR ENFORCEMENT OF THE JUDGMENT** was served this 15 day of July, 2011, on the following by:

Thomas Banducci
Wade Woodard
Dara Labrum
BANDUCCI WOODARD SCHWARTZMAN PLLC
802 W. Bannock Street, Suite 500
Boise, Idaho 83702

___ U.S. Mail
___ Hand Delivered
___ Overnight Mail
X Facsimile No. (208) 342-4455

Chad E. Bernards

Thomas A. Banducci (ISB No. 2453)
tbanducci@bwslawgroup.com
Wade L. Woodard (ISB No. 6312)
wwoodard@bwslawgroup.com
Dara Parker (ISB No. 7177)
dparker@bwslawgroup.com
BANDUCCI WOODARD SCHWARTZMAN PLLC
802 W. Bannock St., Suite 500
Boise, ID 83702
Telephone: (208) 342-4411
Facsimile: (208) 342-4455

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	Case No. CV-OC 0917209 **REPLY IN SUPPORT OF DEFENDANT'S MOTION TO WAIVE REQUIREMENT OF SUPERSEDEAS BOND AND STAY EXECUTION AND/OR ENFORCEMENT OF THE JUDGMENT**

Defendants H. Craig Van Engelen and Kristen Van Engelen ("the Van Engelens") submit this reply in support of their Motion to waive the supersedeas bond and stay execution and/or enforcement of the Judgment.

ARGUMENT

As this Court is aware, during the pendency of an appeal, a district court may stay execution of a judgment and waive the requirement of all security, for any "good cause shown."

I.C. § 13-202(4). As demonstrated in the Van Engelens' previous briefing, ample good cause exists. Each of the Van Engelens arguments is informed by one bizarre fact: Washington Federal Savings ("Washington Federal" or "the Bank") has admitted its intention to use Idaho's execution process to foreclose the Van Engelens' right to appeal the very judgment being executed upon. Under these circumstances, requiring the Van Engelens to post security that they cannot afford will result in the loss of their right to appeal, which would do violence to the purpose of the Idaho execution statutes, doctrines of due process, and basic principles of fairness and justice.

A. Requiring a Supersedeas Bond Under These Circumstances is Unjust

Good cause exists for waiving security and staying enforcement of the judgment under the bizarre circumstances of this case for simple reasons of fairness, justice, and the orderly administration of the legal process.[1] The Tenth Circuit case *RMA Ventures California v. SunAmerica Life Ins. Co.*, 576 F.3d 1070 (10th Cir. 2009)[2] ably explains the unfairness which would result if Washington Federal is allowed to execute upon a judgment by forcing the sale of the Van Engelens' right to appeal that judgment:

> As a matter of public policy, I doubt the wisdom of a rule that readily places the right to appeal on an auction block. More troublesome still is a rule permitting a [judgment creditor] to purchase its opponent's appellate rights, thereby

[1] Washington Federal spends several pages outlining the procedural history of the Idaho case *Smith v. Corlette* (Ada County District Court Case No. CV OC 2008-09440; Supreme Court Docket No. 37060-2009.) While that case has some similar features to the present case, nothing can be inferred about its conclusion, a bare, unpublished order dismissing the appeal signed by the clerk of the Supreme Court. That order, which contains no analysis, has no precedential value. It cannot be inferred that the Supreme Court has or would approve of the procedure of foreclosing on the right to appeal in order to satisfy the judgment that is the very issue of the appeal. The Court should therefore disregard Washington Federal's citation to this unpublished order.

[2] This case was described at length in the Van Engelens' Motion Contesting Claim of Exemption, which they incorporated by reference into the present Motion.

> extinguishing a . . . claim. "[A judgment creditor] obviously has no intention to litigate a claim against itself." *Snow, Nuffer, Engstrom & Drake v. Tanasse*, 980 P.2d 208, 211 (Utah 1999). Today's decision thus incentivizes [a judgment creditor] to attempt an end run around merits determinations by purchasing [its opponent's] right to appeal. This incentive is at its zenith when it is most offensive-in those cases in which a [judgment creditor] believes it would likely lose the merits appeal. . . .

RMA Ventures California, 576 F.3d at 1076 (Lucro, Circuit Judge, concurring).

If the Court requires security or declines to stay execution, this will allow Washington Federal to use the Idaho execution statutes in a way that is not consistent with the purpose of those statutes. The reason that the Idaho execution statutes allow a judgment creditor to purchase a "thing in action," I.C. § 11-301, is so that the judgment creditor can "step into the shoes" of the judgment debtor and realize the benefit that the judgment debtor would have received from that case.[3] The Idaho execution statutes are not designed to extinguish causes of action, but to allow a judgment creditor to seize property so that its judgment can be satisfied. *Williams v. Paxton*, 98 Idaho 155, 157, 559 P.2d 1123, 1125 (1976) (party was entitled to a writ of execution to satisfy his judgment). That is not the result that Washington Federal is seeking. Washington Federal is seeking to extinguish any opportunity for the Van Engelens to challenge

[3] Washington Federal asks why it should be treated differently from a typical third party creditor, who may execute on a separate judgment by foreclosing on "things in action" without running afoul of due process. (Memorandum in Opposition to Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, p. 10-11.) The answer is simple: a third party creditor is not executing on the right to appeal the very judgment being executed upon. A third party creditor does not, as stated in *RMA Ventures California*, 576 F.3d at 1076, present "a classic chicken-and-egg dilemma" by "extinguish[ing] [judgment debtor's] right to appeal the very merits determination that served as the predicate for the subsidiary judgment in the first place." Washington Federal is not like an ordinary third party creditor using the execution statutes to satisfy a separate judgment, which is still subject to appeal in the other case (and which execution would be undone if the judgment was ultimately reversed, *Radermacher v. Eckert*, 63 Idaho 531, 123 P.2d 426, 429 (1942).) Rather, it is using the execution procedure to extinguish the ability to challenge the very judgment upon which the execution is based. It is that fact which makes Washington Federal's attempt to execute on a "thing in action" a violation of due process, as will be explained in more detail below.

the judgment. This is palpably absurd and deeply unjust, and provides more than ample reason for the Court to waive security and stay execution during the pendency of the appeal.

B. Requiring a Supersedeas Bond Under These Circumstances is an Unconstitutional Deprivation of Due Process

More significantly, requiring security or declining to stay execution of the judgment under these circumstances would be an unconstitutional deprivation of Due Process under the Fifth and Fourteen Amendments of the Federal Constitution, and Article I Section 13 and 14 of the Idaho Constitution. Due Process has been construed to mandate that all citizens shall enjoy free and open access to the courts of the United States. *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S. Ct. 1187, 1191 (1965). It requires that the opportunity to obtain access to the courts be granted to all litigants "at a meaningful time and in a meaningful manner." *Id.* When a state provides a procedure for appeal, due process requires that litigants have "a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts v. Lucey*, 469 U.S. 387, 841, 105 S. Ct. 830, 840 (1985) (emphasis added). The avenues of appeal "must be kept free of unreasoned distinctions than can only impede open and equal access to the courts." *Williams v. Oklahoma City*, 395 U.S. 458, 460, 89 S. Ct. 1818, 1819 (1969). As the Supreme Court has said, "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money." *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 591 (1956) (holding that due process was violated by failing to provide transcript to indigent criminal defendant). Due process "is not a concept to be applied rigidly in every matter. Rather, it 'is a flexible concept calling for such procedural protections as are warranted by the particular situation.'" *Aberdeen-Springfield Canal Co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999) (quoting *City of Boise v. Industrial Comm'n,* 129 Idaho 906, 910, 935 P.2d 169, 173 (1997)). The particulars of this situation require

the court to waive the supersedeas bond and stay execution in order to protect the Van Engelens' due process rights.

Washington Federal first contends that Idaho's levy and execution procedures provide sufficient procedural process. (Memorandum in Opposition to Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, p. 7.) As noted above, Due Process requires an opportunity to be heard "at a meaningful time and in a meaningful manner," *Aberdeen-Springfield Canal Co.*, 133 Idaho at 91, 982 P.2d at 926, and "a fair opportunity to obtain an adjudication on the merits of [an] appeal." *Evitts*, 469 U.S. at 841, 105 S. Ct. at 840 (emphasis added). Under the circumstances of this case, Idaho's levy and execution statutes are the very source of the problem. It is for this reason that the Van Engelens have requested relief from this process. Washington Federal's reliance on the "process" supposedly afforded by the levy and execution procedure fails to take into account that Washington Federal is attempting to execute upon the right to appeal the very judgment upon which the execution is based. As Washington Federal has stated its intention to purchase and then dismiss the appeal of that very judgment, the execution process is being used to forestall any review of the merits of the judgment. Unless the execution and levy process is forestalled by this court, the Van Engelens will be deprived of "a fair opportunity to obtain an adjudication on the merits of [their] appeal," *Evitts*, 469 U.S. at 841, 105 S. Ct. at 840 (emphasis added), the very definition of a Due Process violation.

Contrary to Washington Federal's attempts to distinguish the case, *Texaco Inc. v. Penzoil Co.*, 784 F.2d 1133 (2d Cir. 1986) *overruled on procedural grounds*, 481 U.S. 1 (1987) clearly demonstrates that a supersedeas bond requirement that interferes with a meaningful appeal constitutes a deprivation of due process. As explained more fully in the Van Engelens' initial

briefing, relief in that case was sought from a bond requiring security for $12 billion. The Court held that:

> enforcement of the Texas lien and bond requirements against Texaco's property to the extent of $12 billion lacks any rational basis, since it would destroy Texaco and render its right to appeal in Texas an exercise in futility. This would at least amount to a deprivation of its property in violation of its right to due process under the Constitution.

Id. at 1145. As the Court further explained, "[i]t is self-evident that an appeal would be futile if, by the time the appellate court considered his case, the appeal had by application of a bonding law been robbed of any effectiveness." *Id.* at 1154. In the present case, the situation is even more dire. Unless the bonding requirement is waived, the Van Engelens' appeal will not be merely futile, but entirely abrogated. *See Henry v. First National Bank of Clarksdale.* 595 F.2d 291, 305 (5th Cir. 1979) (enjoining the execution of a state court judgment for $1.25 million in damages during the pendency of an appeal when supersedeas bond would bankrupt judgment debtor); *Trans World Airlines v. Hughes*, 515 F.2d 173 (2nd Cir. 1975) (noting that "[i]f a defendant has to liquidate all or a substantial part of his business in order to exercise the right of appeal, then the appeal may surely be of doubtful value"); *Pleasant v. Evers*, 1998 WL 205431 *1, (E.D. Pa. 1998) (supersedeas bond requirement, as applied to indigent tenants unable to enter the necessary security, violated procedural and substantive due process under the Fourteenth Amendment to the United States Constitution.)

Washington Federal attempts to distinguish *Texaco* because that court did require the posting of some bond, reducing the requirement from $12 billion to $1 billion. The fact that the *Texaco* court ultimately determined that a multi-billion dollar corporation could and should post some measure of a bond does not alter the due process analysis. As Washington Federal itself admits, *Texaco* stands for the proposition that the lien and bond provisions at issue in that case

were unconstitutional "as applied." (Memorandum in Opposition to Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, p. 8.) They are likewise unconstitutional "as applied" here.

Washington Federal also argues that the Court should not rely on *Texaco* because it is based on "extraordinary circumstances," including the fact that that a bond would cause catastrophic results to a major company and thereby harm many other individuals. The "extraordinary circumstances" referenced by the Court in *Texaco*, were:

(1) "a private civil money judgment in an amount unprecedented in the annals of legal history,"

(2) "a clear inability on the part of the judgment debtor to comply with a state law mandating a bond in the full amount of the judgment pending appeal,"

(3) "the prospect that the state appellate court would not rule on the constitutionality of the state law before the judgment creditor acted to enforce the judgment,"[4] and

(4) "likelihood that immediate enforcement of the lien and bond provisions would lead to irreversible destruction of the debtor before its appeal could be heard and decided on the merits, thus robbing its right of appeal of any meaning and effect."[5]

Texaco, 784 F.2d at 1157. All of these circumstances, save the first, exist in this case. Moreover, the third and fourth factors are even stronger. There is a serious risk in this case that the Idaho Supreme Court will never have the opportunity to rule on the constitutionality of the procedure that Washington Federal is attempting. If this Court declines to stay execution, the Van Engelens will obviously attempt to appeal that decision, but nothing would stop Washington

[4] The precise posture of this third factor is not relevant to the present case, as the *Texaco* court was enjoining a state court judgment. Similar to that that issue, however, is the prospect in this case that the Supreme Court will not have the opportunity to rule on the constitutionality of the procedure that Washington Federal is attempting. If this Court declines to stay execution, the

[5] The Van Engelens' case is stronger on this point because they would be robbed not merely from a meaningful appeal, but any appeal at all.

Federal from executing upon its judgment by foreclosing on that appeal as well. The Van Engelens' case is also stronger on the fourth point because they would be robbed not merely from a meaningful appeal, but any appeal at all. With respect to the amount of the bond, a $6 million bond for the Van Engelens is no less catastrophic for the Van Engelens than a $12 billion bond was for Texaco. In fact, it is worse for the Van Engelens. Texaco could have posted security for the $12 billion by fully collateralizing its assets. *Texaco*, 784 P.2d at 1138. The Van Engelens could not begin to post security even if they liquidated every asset they own. (*See* Affidavit of H. Craig Van Engelen.) Finally, the fact that this personal catastrophe to the Van Engelens does not impact others on a global and national basis does not change their entitlement to due process, which is an individual right guaranteed by the Constitution.

C. Good Cause Exists to Waive the Requirement of the Supersedeas Bond

Washington Federal argues that the sworn affidavit of Craig Van Engelen about his financial condition is insufficient to demonstrate that the Van Engelens cannot afford the bond or other security which would forestall execution on the judgment. The Bank seems to argue that the Van Engelens must produce documentary evidence of their assets. Contrary to Washington Federal's argument, this affidavit is more than sufficient. First, it does not contain mere conclusory statements, but details the nature and extent of their liabilities as compared with their assets. He testified that their liabilities, including those owed to Washington Federal, exceed $20 million (Affidavit of H. Craig Van Engelen in Support of Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, filed July 6, 2011, at ¶ 6-7). He further testified that they have liquidated most of their remaining business assets to satisfy other debts, that they have had no income for five years, and that their liabilities far exceed their very limited remaining assets. (*Id.* at ¶¶ 5-9). He testified that they were unable to

qualify for a bond and could not post a cash deposit. (*Id.* at ¶¶ 10-11). A witness may testify to his personal knowledge. I.R.E. 602. Mr. Van Engelen certainly has personal knowledge about whether the Van Engelens' liabilities exceed their assets and their inability to post security in the amount of to stay execution. There is no requirement that Mr. Van Engelen must submit documentary evidence to bolster his sworn testimony, although they will do so if that is the Court's preference.

Finally, contrary to Washington Federal's contention otherwise, the Van Engelens' assertion that good cause exists for waiving the supersedeas bond and execution upon the judgment does not hinge solely on their inability to afford a supersedeas bond. (Memorandum in Opposition to Defendants' Motion to Waive Requirement of Supersedeas Bond and Stay Execution and/or Enforcement of the Judgment, p. 11.) Rather, good cause exists because they are unable to afford a supersedeas bond and, being thus unable to forestall execution on the judgment, are about to lose their right to appeal.

CONCLUSION

For these reasons, and the reasons stated in their earlier briefing, the Van Engelens request that this Court waive the requirement of a supersedeas bond and stay execution and/or enforcement of the judgment.

DATED this 22nd day of July 2011.

BANDUCCI WOODARD SCHWARTZMAN PLLC

Dara Parker
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22 day of July 2011, a true and correct copy of the within and foregoing instrument was served upon:

David E. Wishney
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Facsimile (208) 336-5956
- ☐ Hand Delivery
- ☐ Overnight Delivery

Dara Parker

Thomas A. Banducci (ISB No. 2453)
tbanducci@bwslawgroup.com
Wade L. Woodard (ISB No. 6312)
wwoodard@bwslawgroup.com
Dara Parker (ISB No. 7177)
dparker@bwslawgroup.com
Banducci Woodard Schwartzman PLLC
802 W. Bannock St., Suite 500
Boise, ID 83702
Telephone: (208) 342-4411
Facsimile: (208) 342-4455

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

WASHINGTON FEDERAL SAVINGS, a United States Corporation, Plaintiff, vs. H. CRAIG VAN ENGELEN and KRISTEN VAN ENGELEN, Defendants.	Case No. CV-OC 0917209 **SUPPLEMENTAL AUTHORITY IN SUPPORT OF THE VAN ENGELENS' MOTION TO WAIVE SUPERSEDEAS BOND AND/OR ENFORCEMENT OF THE JUDGMENT**

At the hearing conducted concerning the Van Engelens' Motion to Waive the Supersedeas Bond and/or Enforcement of Judgment, held on September 1, 2011, the Court invited the parties to submit additional authority regarding the Court's statutory authority to waive the supersedeas bond. The Van Engelens would like to take this opportunity to address two rules promulgated by the Idaho Supreme Court. As the Court is aware, under Idaho Code

§ 13-202, "[t]he supersedeas bond or cash deposit requirements may also be waived in any action for good cause shown as provided by rule of the supreme court." The Supreme Court rules concerning supersedeas bonds are contained in Idaho Rule of Civil Procedure 62(a) and Idaho Appellate Rule 13(b).

A. *I.R.C.P. 62(a)*

The Court may wish to examine Idaho Rule of Civil Procedure 62(a), which broadly provides that "[e]xecution or other proceedings to enforce a judgment may issue immediately upon the entry of judgment, unless the court in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs" (emphasis added). The Court of Appeals has interpreted this Rule a number of times. It has noted, for example, that "[a] trial court possesses the authority to compel obedience to its orders . . . and to direct the execution of a judgment "on such conditions for the security of the adverse party as are proper." *Merrill v. Gibson*, 142 Idaho 692, 695, 132 P.3d 449, 452 (Ct. App. 2005) (citing I.R.C.P. 62(a)). Relative to this rule, the Court of Appeals has also said that "[t]he power to stay the execution on a judgment rests within the discretion of the trial court. . . . A stay of execution may be granted when it would be unjust to permit the execution on the judgment, such as where there are equitable grounds for the stay or where certain other proceedings are pending." *Haley v. Clinton*, 123 Idaho 707, 709, 851 P.2d 1003, 1005 (Ct. App. 1993). This rule suggests that the Court has been given discretion by the Supreme Court to grant a stay of execution if execution would be unjust. As the Court knows, the Van Engelens contend that just such a situation exists here, where Washington Federal is attempting to execute on the right to appeal the judgment on which it is executing.

B. *I.A.R. 13(b)(8)*

The Van Engelens also direct the Court's attention to Idaho Appellate Rule 13(b)(8). Rule 13(b) addresses various motions that the district court may take up during the pendency of an appeal. Subsection (8) provides that the district court has the power to "[e]nter a stay of execution or enforcement of any injunction or mandatory order entered by the court upon such conditions and upon the posting of such security as the court determines in its discretion" (emphasis added). This expressly gives the court discretion to enter a stay of any order entered by the court on any terms it deems reasonable. That can be contrasted with subsection (15), which states that the court has the power to enter a stay of a money judgment upon the posting of a supersedeas bond. Subsection (15) implies that when an appropriate supersedeas bond is posted, the stay should be granted as a matter of course. Notably, this subsection does not give the Court discretion when a supersedeas bond is posted. However, just because a Court should enter a stay when a supersedeas bond is posted under subsection (15) does not preclude its exercise of discretionary power to stay "any" order, as expressly stated by the Supreme Court in subsection (8), upon terms that the district court believes are just.

Based on either Idaho Rule of Civil Procedure 62(a) or Idaho Appellate Rule 13(b)(8), the Court has statutory authority to waive the requirement of the supersedeas bond.

DATED this 2nd day of September 2011.

BANDUCCI WOODARD SCHWARTZMAN PLLC

/s/ Dara Parker

Dara Parker
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of September 2011 a true and correct copy of the within and foregoing instrument was served upon:

David E. Wishney
Attorney and Counselor at Law
988 S. Longmont, Ste. 100
P.O. Box 837
Boise, ID 83701

- ☐ U.S. Mail
- ☒ Facsimile (208) 336-5956
- ☐ Hand Delivery
- ☐ Overnight Delivery

Dara Parker